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REPORTS OF CASES

IN

CRIMINAL LAW,

ARGUED AND DETERMINED

IN ALL THE COURTS IN ENGLAND AND IRELAND.

EDITED BY

EDWARD W. COX, Esq., OF THE MIDDLE TEMPLE,

~~Barrister-at-Law.~~

VOL. VII.

1855 to 1858.

L O N D O N :

JOHN CROCKFORD, LAW TIMES OFFICE, 29, ESSEX STREET,
STRAND.

1858.

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SOUTH WALES CIRCUIT, by ÆNEAS J. M'INTYRE, Esq.;

IRELAND, by P. J. M'KENNA, Esq.;

Barristers-at-Law.

REPORTS
OF
Criminal Law Cases.

Ireland.

DUBLIN COMMISSION COURT, GREEN STREET.

(Before LEFROY, C. J., and MONAHAN, C. J.)

August 10, 1854.

REG. v. GRAHAM GLASSIE and FRANCES COONEY. (a)

Evidence — Admissibility of prosecutor's testimony against person jointly indicted with prosecutor's wife—Stealing by paramour of property taken by wife when eloping.

Where a prisoner is indicted jointly with the prosecutor's wife, who had eloped with him, for stealing clothes and money, the property of the husband, the wife should be acquitted, as no indictment lies against her, but the husband's evidence is admissible against the male prisoner.

The fact that the wife's clothes (which are in point of law the property of the husband) are found in the trunk of a person with whom she has eloped, is evidence to go to the jury of an intention to appropriate such clothes, and if the jury find that the intention was to remove them out of the husband's control, and to keep them within the prisoner's disposal, the offence is complete.

THE prisoners were indicted for stealing 16l. and divers articles of wearing apparel, the property of Robert Cooney. There was a second count as receivers. From the evidence, it appeared that the female prisoner was the wife of the prosecutor, and that she had eloped with the male prisoner, taking with her the articles mentioned in the indictment. The prisoners had been arrested in Cork, and at the time of their arrest the clothes were found in a

(a) Reported by P. J. M'KENNA, Esq., Barrister-at-Law.

REG.
v.
GLASSIE AND
COONEY.

1854.

Husband and
wife—
Evidence.

trunk belonging to the male prisoner, and acknowledged by him to be his. The woman had the key of the trunk, however, and gave it to the constable, saying she had put them there. The Crown were about examining the husband for the prosecution, when

J. A. Curran, for the prisoners, objected to the reception of his evidence in a case in which his wife was indicted jointly with the prisoner at the bar. It is laid down in Archbold's Criminal Law, 227, that a husband or wife cannot be witness for a person jointly indicted with the wife or husband. *R. v. Smith* (1 Moo. C. C. 289) is the authority referred to for the proposition.

There is a case in Roscoe's Criminal Law, 149, where a woman was not allowed to prove an *alibi* for persons jointly indicted with her husband.

Per Curiam.—The woman is entitled to be acquitted, as she could not steal her husband's property. Now, if there were separate bills sent up against the prisoners, the husband's evidence would be admissible on the trial of the male prisoner. The evidence was admitted.

J. A. Curran, in addressing the jury, observed that the probability was, that the woman was taking those clothes for her own use, and that it was not reasonable to say, even if they were in Cooney's trunk, that he was taking such articles either for his own use or to convert them to any purposes of his own.

LEFROY, C. J., in charging the jury, after going through the evidence, said: We are of opinion that the husband was a competent witness for the prosecution, as a wife cannot be convicted for stealing her husband's goods, and in reality he has been examined only against the male prisoner, as the wife must be acquitted of this charge, and the only objection taken is, that the prisoners have been jointly indicted, one which we do not think should exclude his evidence under the circumstances. With regard to the wife, you should acquit her, and the only question for your consideration is the evidence of the male prisoner being a participator under the circumstances mentioned. The law is, if a person takes from the wife of any man his goods, under circumstances which indicate taking with a felonious intent, he will be equally culpable as if he took them from the husband directly. You should then direct your attention to the evidence in that view. It is stated by the first witness that the male prisoner was living as servant in the same house with the prosecutor and his wife, that the prosecutor had given the female prisoner 18*l*. to keep for him, and, as from the evidence, it appears that none of that money came to his hands, you should acquit him of that part of the charge. There is, however, another, that of stealing the clothes of the wife, which are, in point of law, the property of the husband. These are traced into his possession under circumstances which will lead to the inference that he knew them to be the clothes of the prosecutor's wife. With that view it is given in evidence that the name of the woman was changed, and a passage ticket to America taken out in the joint

name of Walker. The mere circumstance of knowing her to be the wife of the prosecutor would not suffice, unless it was further proved that the clothes of the wife came into his possession with intent to steal them. You heard the evidence with regard to his giving her the key of the trunk in which the clothes were found. It has been suggested that he may have given it to her for another purpose than that of placing these clothes there; but if they were in the trunk with his knowledge, it is sufficient to establish the case against him. Then as to the felonious possession. If the goods were put into this trunk with the view of carrying them out of reach of the husband, and depriving him of them, in point of law such a taking as that would constitute a felonious taking and for the purpose of stealing; for if you deprive a man absolutely of his goods, and have it within your own power and grasp, the law will presume you do that for your own benefit.

*The jury acquitted the female prisoner,
and found Cooney guilty.*

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v.
GLASSIE AND
COONEY.
—
1854.
—
*Husband and
wife—
Evidence.*
—

Ireland.

DUBLIN COMMISSION COURT, GREEN STREET.

(Before MONAHAN, C. J., and RICHARDS, B.)

October 27, 1854.

REG. v. ——. (a)

Punishment—Pleading guilty—Respectability of prisoner—An aggravation of the offence.

The fact that the prisoner is a person of character, and of a respectable position in life, instead of being a reason for mitigating the punishment, adds to the criminality of the offence, and calls for a more severe sentence.

The prisoner, who pleaded guilty to stealing a gold watch from a house at which she was visiting, in an affidavit in mitigation of punishment, stated, that she had no felonious design in taking the watch, that it was a temporary embarrassment which had induced her to take it to raise money on it, and that she intended releasing and returning it to the owner; that her family were in a respectable condition of life, and that the disgrace of committing such an offence, and the loss of character, was a most serious punishment. It was considered, however, by the court, that such circumstances constituted an aggravation of the offence, as it was neither from want or ignorance that the prisoner had committed the crime.

THE prisoner, who was from her appearance of a respectable rank of life, was indicted for stealing a gold watch and chain. She had pleaded guilty, and in an affidavit which had been made by her and laid before the court with the view of mitigating the sentence, she stated that she had been visiting at a friend's house, and at the time had been pressed by a person in the country for the payment of a few pounds; that she took the watch for the purpose of raising the means to pay this debt, with the intention of releasing the watch and restoring it to the owner; that she never had any intention of appropriating it, but took it to be released from the temporary embarrassment; that she was in

(a) Reported by P. J. M'KENNA, Esq., Barrister-at-Law.

the habit of getting embroidery work, for which she was paid; and that in this way she intended to restore the watch.

J. A. Curran, who appeared for the prisoner, stated that it was not by the advice of counsel that the young lady had pleaded guilty, that it was entirely her own suggestion and wish, and called, as a witness to character, a gentleman, who stated that he knew the prisoner; that she belonged to a family moving in a respectable rank of life, respectably connected, and of unimpeachable character; and that one of her sisters was a governess in a family of respectability.

RICHARDS, B.—This is a very difficult case to deal with: in my opinion the prisoner's not being in impoverished or distressed circumstances aggravates the case. It is entirely a mistake for persons to imagine that by pleading guilty prisoners will thereby escape with a lighter punishment. If a person in an inferior situation, inferior in point of education, of character, and means, commit an offence such as this, it strikes me they are less morally guilty than a person of the rank and condition of the prisoner.

REG.
v.

1855.

*Mitigation of
punishment.*

Ireland.

COURT OF QUEEN'S BENCH.

(Before CRAMPTON, PERRIN and MOORE, JJ.)

June 8, 9 and 11, 1855.

REG., on the prosecution of ARMSTRONG v. KIERNAN.(a)

*Criminal information—Cause against conditional order for—Provoking to fight a duel—Privilege of counsel.**Where a conditional order for liberty to file a criminal information for sending a letter provoking to fight a duel has been granted, although it might be good cause against making such order absolute, that the prosecutor, who had spoken injuriously of the defendant in addressing a jury had so spoken maliciously, and not bonâ fide in the discharge of his duty as counsel; yet, where the Court is not satisfied that such injurious expressions of the prosecutor were irrelevant, malicious, and not bonâ fide, they will make absolute the order.**Although the Court may be of opinion that the observations of counsel, which provoked the sending such a letter, were privileged as being pertinent to the issue and not malicious, yet when such observations have been unusually harsh and irritating, it will, in making absolute the conditional order, put a stay upon the issuing of the information until further application.*

IN this case a conditional order, for liberty to issue a criminal information, had been obtained against the defendant for sending the following letter to the prosecutor, Richard Armstrong, Esq., Q.C. :



"43, Dame street, March 30.

"SIR,—I have received yours of yesterday's date referring me to the letter of the 26th for a final reply to mine of the 28th. Now, considering the provocation which I received, and my knowledge of the motives which prompted it, I consider that I have extended towards you a generous forbearance in giving you repeated opportunities of explaining, in the coolness of reflection, language

(a) Reported by P. J. M'KENNA, Esq., Barrister-at-Law.

which I was anxious to look upon as used in the heat of excitement and intemperate advocacy. You have failed to avail yourself of these opportunities; and while you have withdrawn the expression of your private deliberate opinion, you have left unmodified and unretracted the terms of coarse and ribald scurrility which I complained of in my letter of the 23rd inst., and therefore I now assume that you adopt, justify, and repeat them, and with this assumption I address you. I am unwilling to criticize too closely the vocabulary of a counsel, from whom nature has withheld the facility of expressing himself in scholarly and gentlemanly language; still less do I desire to limit the latitude of zealous and honourable advocacy. But, after making every possible concession on these points, I must brand the gross and outrageous language you have used towards me as it merits; language, conceived in the malignant heart of a hireling bully, and uttered by the fetid lips of a mercenary coward; language enforced by the instructions of your attorney, scouted by the bar, denounced by the bench, and falsified by the verdict of the jury. A master of human nature has well said, that a man whom you have discovered in the perpetration of a dirty action, becomes your enemy for life. The recollection of being baffled by me in a shabby action, threatened at the suit of Susan Bennett, in December, 1850, against a respectable gentleman in this city, for a letter written by his wife in strict and honourable confidence to a member of your family, still rankles in your dastard heart, and hence your deadly enmity to me. Do not flatter yourself that you can impose on either profession by the false and cowardly plea of public duty and the interest of your client. Your language, your tone, your manner, forced conviction on every man in court, that you were envenomed with personal spite and professional disappointment, to which I can add, the ulceration of mortified feelings, springing from my knowledge of the baseness of your character, and the meanness of your vulgar mind."

The following letters had passed between the prosecutor and the defendant previous to the transmission of the above letter, on which the application was founded:

"Summer Hill, Nenagh, March 23, 1855.

"SIR,—Referring to the statement you made this day in your address to the jury, in which you stated your own private and deliberate opinion that my conduct, in connexion with the proceedings I instituted against Mr. Aylmer for the recovery of rent-charge due by him to Archdeacon Knox, was unscrupulous, corrupt and ungentlemanlike; that I had the most unparalleled impudence to appear in court, and that my evidence this day consisted of gross falsehood and deliberate perjury, I now demand of you, Sir, whether you adhere to such opinion so expressed in public court, and whether, upon reflection, you still adopt the language above referred to.

"Yours, &c.

"FRANCIS KIERNAN."

REG.
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—
*Criminal
information.*
— — .

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Criminal
information.

A second note from Mr. Kiernan demanded a reply, to which the following reply was sent:

“ March 26.

“ SIR,—In reply to your note of the 24th, and its demand, my address to the jury proceeded upon the evidence given before I spoke, and upon what I understood would be offered, and was, in fact, received without objection; I had no intention to throw into the scale against you the influence of any thing which might tend to the expression of my own private opinion. I repeat that I am not aware, and but for your assurance would think it incredible that I did so, and if, as you no doubt think such was the case, I regret the circumstance and retract such expressions. But so far as the language you complain of was employed to suggest or illustrate the views with which the evidence impressed me in my public professional character, and which it was my duty to induce the jury, if possible, to adopt, I must decline to apologize for the use of that language, or in any way to recognise the propriety of the demand you have made. I only did the best I could for my client, and would have reproached myself if I had done less. At the same time I do not hesitate to express my regret, at having been the means, even in the discharge of my professional duty, of creating pain or offence—an alternative which nothing but the paramount claim of duty has ever induced me to adopt.

“ Yours, &c.

“ RD. ARMSTRONG.”

It appeared, from the affidavits filed by the defendant for the purpose of shewing cause, that Mr. Armstrong, in his address, has imputed to the defendant “ the grossest perjury,” “ deliberate and infamous perjury,” “ unscrupulous, corrupt, shabby and sharp practice,” and had observed that the defendant had absented himself from his office to avoid payment by Mr. Aylmer, for the purpose of making costs. There were also a number of affidavits made on behalf of the defendant by jurors, solicitors, and other persons of respectability and station, stating that they had never heard so violent an attack ever made by counsel. Mr. Kiernan charged that the prosecutor was actuated by feelings of spite and malevolence, and that the attack was irrelevant and purely malicious. One reason for this belief assigned by him was that he was not in the habit of giving Mr. Armstrong briefs on circuit. For the purpose of justifying the charge about Susan Bennett, Mr. Kiernan stated that a person of that name was employed as a domestic servant by Captain Grady, of Stillargan Castle, and that defendant was consulted professionally by that gentleman as to an action of libel, which was threatened by Susan Bennett, the subject of the action being a letter written by Mrs. Grady to Mrs. Armstrong, as to the character of the servant, who was about being hired by the latter lady, and which he believed at the time must have been handed over by Mr. Armstrong to Susan Bennett. This was put, not as direct accusation against Mr. Armstrong, but as giving a colour to the charge in the letter. Both Mr. and

Mrs. Armstrong swore that they never gave up the letter alluded to by the defendant in his affidavit to Susan Bennett or any other person. The remaining facts of the case, together with the arguments of counsel, and the few cases cited, will appear sufficiently in the judgment of the court, which was delivered by Crampton, J.

David Lynch, Q. C., and *J. E. Walsh*, were heard on showing cause; and *Brewster*, Q. C., *Martley*, Q. C., and *Francis Brady*, appeared to support the conditional order.

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JUDGMENT.

The parties in this case are Richard Armstrong, Q. C., the prosecutor, a gentleman of eminence and practice in his profession, and the defendant, Mr. Kiernan, a respectable attorney, also in considerable practice. These parties each belong to honourable professions, equally entitled to the consideration and protection of the court. Mr. Armstrong obtained a conditional order for a criminal information against the defendant for sending a letter, bearing date the 23rd of March, 1855, the manifest and unmistakable tendency of which was to provoke Mr. Armstrong to fight a duel with the writer. The defendant stated in his affidavit that he did not intend to provoke to a breach of the peace; however that may be, we must judge of intentions, not by a man's secret motives, but by his acts and declarations. No one can read that letter without coming to the conclusion that the tendency and intent was that which the prosecutor attributes to it, namely, to provoke to fight a duel. According to the ordinary and salutary practice of this court, it would be at once our duty to make absolute that conditional order, if we had only to consider whether the act of the defendant had the tendency which it is alleged it had: but the prosecutor's title to this order is resisted on the grounds that his own misconduct had provoked the injury of which he complains, and that that provocation was a speech made by the prosecutor as counsel in a case of *Kiernan v. Aylmer*, which was tried at the last assizes for the North Riding of Tipperary, in which the defendant was plaintiff, and Mr. Armstrong was professionally engaged for Mr. Aylmer. Undoubtedly the speech of Mr. Armstrong, if not protected by the privilege of counsel, would be slanderous in the highest degree, and the controversy now is whether that speech was so protected. The defendant says the attack on him was wanton, unjustifiable and unnecessary; nay, more, that it was prejudicial to Mr. Armstrong's client, while the prosecutor's counsel say, no matter how severe or galling that speech was, it was spoken by the prosecutor in the discharge of his duty as counsel, that it was all relevant to the matter in issue, and only a legitimate comment on the evidence in the case. If the prosecutor be right there has been no sufficient cause shown against the rule; if the defendant be right it should be discharged. Much has been said in this case on the liberty of speech which the law allows to the advocate. The importance of this liberty, and the necessity for having counsel unfettered, has been strongly urged

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on one hand, and the grievous abuse to which an unrestricted liberty may lead, has been strongly pressed on the other side; but we must say all liberty is liable to abuse and may run into excess, and further, that privileges which are most valuable are most likely to be abused. The impunity of the barrister is not the privilege of the counsel, but of the client whom he represents; and I would say, freedom of speech in courts of justice is as necessary for the protection of life, liberty and property, as it is in either house of Parliament. Mr. Lynch, however, for the defendant, said, in his able speech, which was a mixture of zeal and temperance which cannot be too much praised (and I should say the way in which this case has been discussed shows how counsel can discuss with temperance, moderation, and propriety), let the advocate be perfectly free, but let not his freedom degenerate into malicious slander or licentiousness; but how are the limits to be fixed, I would ask? With great deference, I say it is impossible to fix these limits. In the heat of *Nisi Prius*, in the full tide of impassioned eloquence, the most correct counsel may pass the bounds of temperance. Human nature is frail; there are securities, however, against abuse. Self respect, considerations of duty, feelings as a gentleman, a barrister, and a Christian, the interference of the presiding judge, even the personal interest of the advocate, are better safeguards than statutes or the interference of criminal courts. I do mean to say, however, that when that liberty has been made a cloak for malice, that in such a case the slanderer should not be allowed to shelter himself in this robe of protection, or that in such a case he will find favour or protection in this court. It was stated that the defendant had no remedy by action for the injury which he complains of; whether he has or not is not now the question before the court; but I consider *Hodgson v. Scarlett*(a) lays down two positions in conformity with the earlier cases,—first, that counsel is not liable, no matter how strong or severe his observations, if they were made *bonâ fide* and were pertinent to the case; secondly, that when it is proved that the injurious words were not spoken *bonâ fide*, and that there was express malice, the words, which would otherwise be privileged, may be actionable. In *Hodgson v. Scarlett*, Mr. Scarlett's words were, "that the act (the defendant's) was one of the most profligate things I ever knew to be done by a professional man," and "he (the defendant) is a fraudulent and wicked attorney." Severe and insulting as these observations were, because the court considered them relevant to the matter in issue in that case, and spoken *bonâ fide*, commenting on the evidence, they held them not to be actionable. The words complained of here are perhaps more strong and more severe than those used by Mr. Scarlett; but did the prosecutor use them, *bonâ fide* considering them a fair comment on the evidence? To come more immediately to the matter before us, how are we to determine between the

(a) 1 Bar. & Ald. 232.

prosecutor and the defendant? On their statements are we to determine that these observations were relevant to the issues on the record? How are we to institute the investigation? Such a question must be tried by a jury. How is the court in its present attitude and position to pronounce on such a question. The action in which Mr. Armstrong's speech was made was one for libel, contained in letters written by Mr. Aylmer to Archdeacon Knox, reflecting on the character of Mr. Kiernan. The charge in this letter was, that Mr. Kiernan, in a matter referred to, had been guilty of sharp practice and of manufacturing costs. These were the libels complained of, and the extraordinary defence set up was, that the charges were true in substance, and that Mr. Aylmer made them in the belief in their truth, and without malice. The monstrous issues offered by this defence, unwarranted either by the Common Law Procedure Act or by any thing else, was taken by Mr. Kiernan in my opinion most rashly. He gives as his reason for so doing, that he wished to vindicate his character from the libel as completely and as soon as possible, and accordingly issues were agreed on, whether the matter stated in the libel were true in fact or not, and whether Mr. Aylmer wrote them without malice, and with a belief in their truth as alleged. I think a wider issue could not be taken, or one allowing more latitude to counsel. The prosecutor was counsel for Mr. Aylmer, it was his duty to persuade the jury that these several charges were true, and that the defendant had been guilty of sharp practice of manufacturing costs; and it is lamentable to think that a difference as to a miserable sum of 4s. 6d., should have led to all these consequences. The defendant, on the trial of that action for libel, offered himself as a witness, and asserted no doubt his innocence of the charge made against him by Mr. Aylmer. He was cross-examined, and doubtless closely, and at length. Two witnesses, Byrne and Roe, contradicted him in some matters. The witnesses were confronted, and there was a conflict of evidence between Mr. Aylmer and Mr. Kiernan. The questions were put, and answers made over again. Was not, under these circumstances, the advocate for Mr. Aylmer justified in asserting the truth of his client's case? We cannot find anything that was said by Mr. Armstrong that was irrelevant that can be called malicious, and not *bonâ fide* intended to persuade the jury that Mr. Aylmer's statements were correct. I am not here adverting to some of these epithets so justly complained of. Much was said about private prejudice and malice on the part of Mr. Armstrong, and that he used the occasion of this trial to abuse and insult the defendant. However Mr. Kiernan may have grounds for entertaining this suspicion, it is no more than suspicion, and there is no evidence before us to lead us to that conclusion. The matters referred to to support this charge I shall not go into, and the story about Susan Bennett is quite insufficient to found any such notion. At first the court was disposed to think it of some importance, but when it came to be examined and

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explained the whole fabric at once vanishes into thin air. I do not mean to say that the defendant had not reasonable grounds for the suspicion he entertained, but we cannot assume that the prosecutor's observations were irrelevant or malicious, and we have no mode of trying this question on a motion for liberty to file a criminal information. I must, however, say this much, not in justification, but in palliation of the defendant's conduct, that there are before us fifteen affidavits, which, if true, abundantly establish that the speech of Mr. Armstrong was one of extreme, I may add, of undue severity, calculated to wound his feelings and deeply injure him both in his private and professional character, and that it went far beyond the bounds usually taken by counsel in advocating their client's case. I am happy to say Mr. Kiernan was acquitted of the charge and had a triumphant verdict, and I would have hoped the matter might have ended then. I wish he had been satisfied with his triumph and the assertion of his innocence. Stung, however, with the castigation he received, he wrote these letters, one on the day after the trial, the other after a lapse of a couple of days. I must say Mr. Armstrong's answer was manly and honest. The defendant, in his first letter, called Mr. Armstrong's attention to the statement in his speech, that in his (counsel's) private and deliberate opinion Mr. Kiernan's conduct had been unscrupulous, corrupt, and ungentlemanly, and he was asked would he adhere to that statement. Mr. Armstrong's answer was, that he was not aware of having so expressed himself, but that, if he had, he regretted and retracted the expression. I think that letter does him and his advisers credit. He also refused to retract any observation made by him *as counsel* during the trial. Now, to pause here, I think the defendant after this should have stayed his hand. He had got a verdict in his favour, a retraction of that of which he had first complained. Mr. Armstrong disclaimed having given his own testimony or expressed his private opinion, and if such had fallen from him, he regretted and retracted it. The defendant, however, was not yet satisfied, and he sent the letter of the 23rd of March, the letter on which the conditional order was obtained. I cannot characterize too strongly the coarseness, the illegality, or the impropriety of that letter, and not one word in vindication of it was offered by the defendant's counsel. The charges against Mr. Armstrong contained in that letter are fully denied by him, and the cause therefore, shown by the defendant in this part of the case, falls to the ground. We cannot say that the letter of the 23rd was provoked by the misconduct of the prosecutor. It appears, however, that the speech of the prosecutor was one of unusual and extreme harshness and severity, and that observations were made, not only calculated to irritate but to inflict deep injury. Under these circumstances what is the court to do? By refusing the information, we should admit that the defendant's letter was provoked by improper conduct of the prosecutor; by granting it unqualifiedly, we should approve of all that fell from the prosecutor on the trial. We are,

for the first time, called on to decide in such a case. The court has looked into the case of *Butt v. Jackson*, and we are disposed to apply the rule in that case to the present, to adhere to the doctrine there laid down, and to adopt the language of the eminent judge who was then chief of this court. The cases are very much alike, and the fact that a challenge was sent by the defendant, Mr. Jackson, makes no difference; for sending a letter which must provoke a challenge is not substantially different from sending a challenge. I had intended to have read some passages from the judgment of Chief Justice Blackburn in that case, but I find I have already taken too much time. The rule in this case will be the same as in *Butt v. Jackson*, disallow the cause shown. and make the conditional order absolute; the information not to issue without further order of the court.

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COURT OF CRIMINAL APPEAL.

(Before MONAHAN, C.J., PIGOT, C.B., CRAMPTON and
BALI, JJ., and GREENE, B.)

REG. v. MARCUS BONNER.(a)

Indictment—"Parcel"—Pleading—Sufficiency of description.

The word "parcel" is not a sufficient description of the property alleged in an indictment to have been stolen, and the court will quash a conviction upon such an indictment.

The prisoner was indicted for stealing "one parcel of the value of one shilling, of the goods," &c. The parcel in question was taken from the hold of a vessel, out of a box broken open by the prisoner.

Held, an insufficient description.

THE following case was reserved by the Recorder of the borough of Londonderry.

"The prisoner, Marcus Bonner, was tried before me at the last

(a) Reported by P. J. M'KENNA, Esq., Barrister-at-Law.

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October Sessions of the Peace for the borough of Londonderry, on an indictment of which a copy is annexed. It appeared in evidence, that on the 3rd of September last the prisoner was employed by the prosecutors, who are the owners of the steamer *Lyra*, in stowing the cargo with which the said vessel was being loaded to proceed to Liverpool, and on this occasion he forced open several boxes which had been lowered into the hold of the vessel, from one of which he abstracted and carried off the parcel in question.

"No evidence of the contents of the parcel was given, and the prosecutors had no property in it, except as carriers. Mr. Hamilton, counsel for the prisoner, contended, that the contents of the parcel should have been stated by name, and that the word "parcel," was not a sufficient description of property stolen. I was of opinion, that in cases like the present, of parties in possession as carriers of goods in packages, of the contents of which they are ignorant, the word "parcel" was a sufficient description of such property, as of a chattel in their possession.

"The prisoner was found guilty, and I respited the sentence, and at the request of Mr. Hamilton, reserved the case for the consideration of the Judges of the Court of Criminal Appeal upon the question whether, in such a case, the word "parcel" is a sufficient description of property in an indictment for larceny.

"W. P. LEATHEM."

The following is the description of the property from the copy of the indictment appended to the case: "One parcel of the value of one shilling, of the goods and chattels of Samuel Gilliland."

Hamilton, for the prisoner.—"Parcel" is not a sufficient description. It does not sufficiently identify the article so as to enable the prisoner, if subsequently indicted on the same charge, to plead *autrefois convict*. A parcel, taking it most advantageously for the Crown, is but a quantity of goods, and in *The King v. —* (1 Chitty Reports, 698.) In that case, which was an indictment for a conspiracy to defraud the prosecutor of "divers goods," Abbott, C.J., expresses an opinion, that though such description was sufficient in an indictment for conspiracy, that it would not suffice in an indictment for larceny. In *Rex v. Fry*, reported 2 Russell on Crimes, 109, it was held, that an indictment for stealing 10*l.* in moneys numbered, is not a sufficient description in an indictment for larceny. In *Rex v. Chalkley* (Russ. & Ry. 258), it was held that "certain cattle" was not a sufficient description. *Non constat*, but this parcel was deeds concerning realty, and thus could not be the subject of an indictment at common law. "Parcel" means either "a part" of something, or "a portion of land," and is therefore utterly insufficient: he also referred to Johnson's Dictionary.

Corballis, Q.C., for the Crown.—The word "parcel" is a sufficient description. From the case it appears that the prosecutors were carriers; it would be a breach of trust and most

improper for carriers to open parcels confided to them, and unless they were to do so, they could not describe the contents of the parcel with that sufficiency which counsel for the prisoner insists on.

GREEN, B.—Suppose a box has been entrusted to a carrier by A. B., and it is stolen from him, cannot he go to A. B. and inform himself of the contents?

PIGOT, C. B.—Justice need not in any way be thwarted by insisting on a fuller description. It might have been described as a brown paper parcel bound with a piece of twine, or some such description of its exterior appearance.

CRAMPTON, J.—Could not an indictment have been framed for taking the covering?

Corballis, Q. C., referred to 1 Will. 4, c. 68, sect. 2, to show the word “parcel” used as a word of description.

MONAHAN, C. J.—You might as well argue that the word “package,” which is also in that act, was sufficient. The truth is, the prisoner stole something, but what it is nobody yet knows.

Conviction quashed.

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COURT OF QUEEN'S BENCH.

Ex parte DOVETON.(a)

November 12, 1855.

Criminal information—Libellous imputation contained in resolution of vestry.

At a vestry meeting a resolution was adopted containing imputations of sacrilege and felony against the rector of the parish, in reference to the appropriation of stone balls belonging to the church. At a subsequent meeting, held in consequence of the rector having called for an explanation and apology, another resolution was passed to the effect that it was not intended by the former resolution to impute sacrilege and felony in a legal sense; that, as the stone balls had been given back, no further proceedings should be taken, and the former resolution expunged. These resolutions were signed by S. as chairman.

The rector did not personally attend the vestry on either occasion:

Held, that under these circumstances there was not sufficient ground for granting a rule for a criminal information against S., although the rector, by his affidavit, completely vindicated himself from any suspicion of improper conduct.

SIR F. THESIGER moved for a rule, calling upon one Saunders, a parishioner of a parish in the county of Devon, to show cause why a criminal information for a libel should not be filed against him. The applicant was the Rev. Mr. Doveton, the rector of the parish, who having found upon the premises belonging to the rectory two stone balls, which he supposed to have formed part of the rectory buildings, but which, in fact, had formerly been removed from the stone pillars of a gateway leading to the church, had given leave to one of the parishioners to take them away, and use them for another gateway. Afterwards discovering his mistake, he informed the person to whom he had given that leave, that he must not have them without obtaining the consent of the churchwardens. Nevertheless, on the 15th September a notice was issued summoning a meeting of the parishioners to decide what steps should be taken in consequence of the appropriation of these stones; and on the 20th a vestry meeting was held, at which a resolution was passed unanimously, imputing in terms that the rector had committed "sacrilege or felony" in the

(a) Reported by A. BRITTON, Esq., Barrister at Law.

appropriation of these stones without leave of the churchwardens. The rector at once required an explanation of, and apology for, this resolution, and demanded that it should be expunged from the minutes of the vestry. In consequence of that request a second vestry meeting was held upon the 4th October; and upon that occasion a resolution was passed to the effect that, although the vestry had no intention of imputing sacrilege or felony to the rector in a legal sense, they could not approve of the removal of the stones without the consent of the churchwardens or parishioners; but that, the balls having been given back, no further proceedings should be taken, and that the former resolution should be expunged. In accordance with that second resolution lines had been drawn through the first resolution, but in a manner which left it quite legible. The rector did not attend either meeting; and Mr. Saunders signed the resolution as chairman.

LORD CAMPBELL, C.J.—I think a rule ought not to be granted in this case. The rector has shown that he acted most properly, and that he has been charged without any foundation. His character is above all suspicion; but, if Mr. Saunders is liable to a criminal information, the whole parish is equally liable. The parishioners meet in vestry; and they come to a resolution, very intemperately and very improperly expressed; but this application is not founded upon that resolution, but upon the other which was passed in explanation of it. The rector required an explanation, and a second vestry was called. So far that was a proper proceeding. They might have come to a resolution which would have been deemed by the rector a satisfactory retraction of the charges contained in the first. But as to Mr. Saunders, all we know is, that he was in the chair. He may have advised the parishioners to come to some more explicit and generous retraction of the terms employed in the first resolution. I rather wish that Mr. Doveton had attended the meetings of the vestry; because I think that if he had attended the first and given the explanation which he has now offered, the first resolution would never have been passed; or, if he had attended the second, and made the same explanation, the vestry would have adopted a more ample retraction and apology. Then, as to the manner in which the first resolution has been expunged, it must certainly be considered as erased, and it may at any time be obliterated. I cannot say that the second resolution alone affords a sufficient ground for issuing a criminal information; and now that Mr. Doveton has by his affidavit completely vindicated his conduct in the matter, I am sure that it is for the peace of the parish and the good of the church that the rule should be refused.

COLERIDGE, J.—I also think that upon these affidavits Mr. Doveton is completely exculpated from the charges made against him; but I should be extremely sorry to have it thought that when a vestry meeting, colourably held for that purpose, is made the means of publishing an attack of a gross and unfounded character upon the rector or any other person, such person could

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not obtain protection from this court. Judging from these affidavits only, the conduct of the persons who voted at these vestry meetings appears to have been extremely scandalous, and I cannot give them credit for any candid and honest wish to retrace by the second resolution the step which they took by the first; but, probably, the opportunity which Mr. Doveton now has had of fully answering these imputations will be sufficient to set him right with his parishioners; and as my Lord has a strong opinion against granting the application, and I think that where there is any doubt the court ought not to grant a criminal information, I acquiesce in the judgment of the court.

WIGHTMAN, J.—If the question had stood upon the first resolution, I should not have doubted that it was a proper case for a criminal information; but considering the subsequent explanation and withdrawal contained in the second, such as it was, I think there is hardly enough to warrant the court in granting a criminal information. The parishioners may have acted under some mistake and erroneous information, which Mr. Doveton might probably have removed, if he had attended either meeting and explained the real circumstances.

LORD CAMPBELL, C. J.—I wish to add that I entirely concur in what has been laid down by my brother Coleridge, that if the inhabitants of a parish should maliciously, and under colour and pretence of meeting in vestry, enter in the parish books resolutions calumniating the rector or any other person, those who so acted would be liable to a criminal information.

Rule refused.

COURT OF CRIMINAL APPEAL.

November 10, 1855.

(Before JERVIS, C.J., PARKE, B., ERLE, J., CROMPTON, J.,
and WILLES, J.)

REG. v. GORDON. (a)

Bankruptcy—12 & 13 Vict. c. 106—Felony in not surrendering—Evidence—Jurisdiction of Commissioners—Publication in Gazette—Notice—Service—Duplicate summons—Joint adjudication—Intent to defraud.

Upon an indictment against one of two bankrupts against whom there was a joint adjudication for not surrendering pursuant to the 12 & 13 Vict. c. 106, the proceedings in bankruptcy, on being put in evidence, showed several alterations and interlineations. The papers were duly sealed with the registrar's seal: Held, that in the absence of evidence as to when the alterations and interlineations were made, the presumption was that they were made in proper time, and that therefore the documents were admissible.

Where a petition in bankruptcy is assigned by ballot to a particular commissioner, it is no objection to the subsequent proceedings that they take place before another commissioner—each commissioner in the London district, while sitting as such, constituting a court.

The duplicate adjudication was left at the counting-house of the bankrupts on the 21st of June, being their last-known place of business. The counting-house was then locked up on behalf of the assignees, and the paper was seen there a fortnight or three weeks afterwards. On the 26th of July, the counting-house was unlocked for the purpose of leaving there the summons to appear, and the place was locked up again. Before the trial the counting-house was searched, and neither of these papers was found. A proper notice to produce them was served upon the prisoners:

Held, that the search at the counting-house and the notice to produce were sufficient to render duplicate originals of both admissible.

The notice in the Gazette described the bankrupts as of West Ham Lane, in Middlesex, but the former proceedings described them as of West Ham Lane in Essex:

Held, that the variance was not such as to invalidate the proceedings.

The Gazette required the surrender of the two bankrupts on two specified days. The summons to appear was not left at the bankrupt's place of business until the first of those days had expired:

Held, that the service of the summons was sufficient.

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Upon the trial the jury found that the bankrupts left the kingdom before the bankruptcy, but believing that they should be made bankrupts, and that they stayed abroad with the intent to defraud their creditors by depriving them of their right to examine them; but there was no evidence that the bankrupts had actual knowledge of the contents of the several documents in bankruptcy, or even of the bankruptcy itself:

Held, that the conviction was nevertheless valid.

November 30.—Before Campbell, C. J., Jervis, C. J., Parke, B., Alderson, B., Wightman, J., Cresswell, J., Erle, J., Platt, B., Crompton, J., and Willes, J.

Only one duplicate adjudication in bankruptcy against the bankrupts, and only one summons to surrender was served:

Held (Jervis, C. J., Erle, J., Platt, B., and Willes J., dissentientibus), that such service was insufficient.

THE prisoner was tried in the August Sessions at the Central Criminal Court, and the following case was reserved by Mr. Justice Erle:—

The indictment was against the prisoner for felony, in not surrendering as a bankrupt pursuant to 12 & 13 Vict. c. 106, s. 251.

The 1st count, after stating the bankruptcy in detail of Davidson and Gordon, alleged that a duplicate of the adjudication was served upon Davidson and Gordon by leaving the same at their usual place of business.

That, on the 30th of June, the court caused notice of the adjudication to be advertized in the *Gazette*, and appointed two public sittings for the bankrupts to surrender—namely, the 7th of July and 19th of August.

That the 19th of August became the day allowed to the bankrupts for finishing their examination.

That, on the 26th of July, notice in writing of the adjudication and of the said sittings, and of the day limited for such surrender and allowed for finishing such examination was left at the usual last known place of business; and that on the 19th of August the prisoners did not surrender.

The 2nd count was the same, except that prisoner is charged with not attending to finish his last examination, on the day of surrender, viz. the 19th of August.

The 3rd count recites the proceedings in bankruptcy as before, and charges that prisoner did not surrender to the Court of Bankruptcy in London, although the Court of Bankruptcy held a sitting for receiving such surrender.

The 4th count, after reciting proceedings in bankruptcy, and that the 19th day of August was the day limited for their surrender to the Court of Bankruptcy, and that twelve at noon of that day was the day and hour allowed by the said court for finishing their last examination, charges that prisoner on the said day so limited, &c., after notice given in the *Gazette* of the said adjudication of the said time being limited for the said surrender, did not surrender himself to the said Court of Bankruptcy at any time on the said day.

The prisoner was properly convicted, unless one of the following objections should be found valid:—

1st. Upon the evidence it appeared that the bankrupts left this kingdom on the 17th of June, believing that they should be made bankrupts, and that they staid abroad with the intent to defraud their creditors by depriving them of their right to examine the bankrupts and to make them responsible, and the jury must be taken to have found that this was so. The papers requisite to prove the bankruptcy were produced. On the petition there was an alteration in the description of West Ham Lane, the place of the distillery of the bankrupts, from Middlesex to Essex.

On the depositions to support it there was the same alteration, and also the name of Davidson was interlined.

On the adjudication there are alterations from Middlesex to Essex, from the 20th to 21st of June, from the name of Holroyd to the name of Fonblanque as commissioner.

But all these papers were produced, sealed with the seal of the registrar of the Bankruptcy Court. Some of the alterations were attested by the initials of the registrar, and there was evidence given in the course of the trial, but after some of them had been read in evidence, that satisfied me that all the alterations were made while the papers were in the course of formation and before they were used as complete.

The objection was, that these papers were not admissible in evidence, and if admitted were invalid by reason of the alterations.

2nd. Upon the petition it appeared that it was assigned by ballot to Mr. Commissioner Goulburn; but the subsequent proceedings were either before Mr. Commissioner Holroyd or Mr. Commissioner Fonblanque. The objection was, that they were invalid on that account.

3rd. The duplicate adjudication was left at the counting-house in Mincing Lane, being the usual and last known place of business of the bankrupts, on the 21st of June. All the papers and property of the bankrupts were removed therefrom, and the place was locked up, on behalf of the assignees, on the same day, but this paper was left and seen there a fortnight or three weeks after this removal.

On the 26th of July the duplicate summons to appear was left at the same counting-house, which was unlocked for that purpose, and then locked up again.

Before the trial the counting-house was searched and neither of these papers were found. Notice to produce these papers was served on the prisoner in prison, and the service must be taken to have been forty-eight hours before the trial began.

I admitted the duplicate originals of these papers to be read, on the ground that no notice to produce was necessary, and if it was, that the search for the originals and the notice to produce was sufficient. The objection was, that these documents were not admissible in evidence.

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Upon the trial the jury found that the bankrupts left the kingdom before the bankruptcy, but believing that they should be made bankrupts, and that they stayed abroad with the intent to defraud their creditors by depriving them of their right to examine them; but there was no evidence that the bankrupts had actual knowledge of the contents of the several documents in bankruptcy, or even of the bankruptcy itself:

Held, that the conviction was nevertheless valid.

November 30.—Before Campbell, C. J., Jervis, C. J., Parke, B., Alderson, B., Wightman, J., Cresswell, J., Erle, J., Platt, B., Crompton, J., and Willes, J.

Only one duplicate adjudication in bankruptcy against the bankrupts, and only one summons to surrender was served:

Held (Jervis, C. J., Erle, J., Platt, B., and Willes J., dissentientibus), that such service was insufficient.

THE prisoner was tried in the August Sessions at the Central Criminal Court, and the following case was reserved by Mr. Justice Erle:—

The indictment was against the prisoner for felony, in not surrendering as a bankrupt pursuant to 12 & 13 Vict. c. 106, s. 251.

The 1st count, after stating the bankruptcy in detail of Davidson and Gordon, alleged that a duplicate of the adjudication was served upon Davidson and Gordon by leaving the same at their usual place of business.

That, on the 30th of June, the court caused notice of the adjudication to be advertized in the *Gazette*, and appointed two public sittings for the bankrupts to surrender—namely, the 7th of July and 19th of August.

That the 19th of August became the day allowed to the bankrupts for finishing their examination.

That, on the 26th of July, notice in writing of the adjudication and of the said sittings, and of the day limited for such surrender and allowed for finishing such examination was left at the usual last known place of business; and that on the 19th of August the prisoners did not surrender.

The 2nd count was the same, except that prisoner is charged with not attending to finish his last examination, on the day of surrender, viz. the 19th of August.

The 3rd count recites the proceedings in bankruptcy as before, and charges that prisoner did not surrender to the Court of Bankruptcy in London, although the Court of Bankruptcy held a sitting for receiving such surrender.

The 4th count, after reciting proceedings in bankruptcy, and that the 19th day of August was the day limited for their surrender to the Court of Bankruptcy, and that twelve at noon of that day was the day and hour allowed by the said court for finishing their last examination, charges that prisoner on the said day so limited, &c., after notice given in the *Gazette* of the said adjudication of the said time being limited for the said surrender, did not surrender himself to the said Court of Bankruptcy at any time on the said day.

The prisoner was properly convicted, unless one of the following objections should be found valid :—

1st. Upon the evidence it appeared that the bankrupts left this kingdom on the 17th of June, believing that they should be made bankrupts, and that they staid abroad with the intent to defraud their creditors by depriving them of their right to examine the bankrupts and to make them responsible, and the jury must be taken to have found that this was so. The papers requisite to prove the bankruptcy were produced. On the petition there was an alteration in the description of West Ham Lane, the place of the distillery of the bankrupts, from Middlesex to Essex.

On the depositions to support it there was the same alteration, and also the name of Davidson was interlined.

On the adjudication there are alterations from Middlesex to Essex, from the 20th to 21st of June, from the name of Holroyd to the name of Fonblanque as commissioner.

But all these papers were produced, sealed with the seal of the registrar of the Bankruptcy Court. Some of the alterations were attested by the initials of the registrar, and there was evidence given in the course of the trial, but after some of them had been read in evidence, that satisfied me that all the alterations were made while the papers were in the course of formation and before they were used as complete.

The objection was, that these papers were not admissible in evidence, and if admitted were invalid by reason of the alterations.

2nd. Upon the petition it appeared that it was assigned by ballot to Mr. Commissioner Goulburn; but the subsequent proceedings were either before Mr. Commissioner Holroyd or Mr. Commissioner Fonblanque. The objection was, that they were invalid on that account.

3rd. The duplicate adjudication was left at the counting-house in Mincing Lane, being the usual and last known place of business of the bankrupts, on the 21st of June. All the papers and property of the bankrupts were removed therefrom, and the place was locked up, on behalf of the assignees, on the same day, but this paper was left and seen there a fortnight or three weeks after this removal.

On the 26th of July the duplicate summons to appear was left at the same counting-house, which was unlocked for that purpose, and then locked up again.

Before the trial the counting-house was searched and neither of these papers were found. Notice to produce these papers was served on the prisoner in prison, and the service must be taken to have been forty-eight hours before the trial began.

I admitted the duplicate originals of these papers to be read, on the ground that no notice to produce was necessary, and if it was, that the search for the originals and the notice to produce was sufficient. The objection was, that these documents were not admissible in evidence.

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4th. The *Gazette* stated that a petition for adjudication in bankruptcy had been filed against Daniel Mitchell Davidson and Cosmo William Gordon, of Mincing-lane and Cousins-lane, Upper Thames-street, in the city of London, colonial brokers and metal agents, and of West Ham Lane, in the county of Middlesex, distillers, dealers and chapmen, and they having been declared bankrupts were thereby required to surrender themselves to Edward Goulburn, Esq., one of Her Majesty's Commissioners of the Court of Bankruptcy, on the 7th day of July next, at eleven in the forenoon, and on the 19th day of August, at twelve at noon, at the Court of Bankruptcy, in Basinghall-street, in the city of London, and make a full discovery, &c.

The former proceedings had described them in the same manner, except that West Ham Lane was in them stated to be in Essex, and not in Middlesex.

The objection was, that the notice in the *Gazette* was insufficient on this account.

5th. The *Gazette* required the surrender on two days as before stated.

The summons, after reciting a petition and an adjudication, stated that E. Holroyd, commissioner, summoned the bankrupts personally to be and appear before Edward Goulburn, serjeant-at-law, at the Court of Bankruptcy in Basinghall-street, in the city of London, on the 7th day of July, 1854, at eleven, and on the 19th of August, 1854, at twelve at noon, the last-named day being the day limited for their surrender under the said petition, and they were then and there to be examined, &c.

This summons was not served by leaving it at the counting-house in Mincing-lane till the 27th July.

The objection was, that this service was insufficient, being after the 7th of July, one of the days appointed for surrendering, and that therefore there was in effect no summons, and therefore no felony.

6th. The memorandum that the bankrupts did not surrender on the 19th of August, stated that Mr. Commissioner Fonblanque sat as commissioner, and that they did not surrender.

The objection was, that as Mr. Commissioner Goulburn did not appear to have sat, the offence was not committed.

7th. It appeared that only one duplicate adjudication in bankruptcy and only one duplicate summons to surrender was served, and,

The objection was that this was not sufficient, there being a joint adjudication against two bankrupts.

8th. There was no evidence that the prisoner had actual knowledge of the adjudication and summons to surrender.

But the jury must be taken to have found that he went abroad with the belief before stated, and stayed abroad with the intent before stated.

The objection was, that the absence of evidence of actual knowledge of the contents of these documents, or of the bank-

ruptcy, rendered the evidence insufficient to support a conviction.

If the evidence is thought to be insufficiently stated, it is to be sent back for a further statement; the original documents in bankruptcy will be in court for reference if necessary.

I reserved these objections for the opinion of the Court of Appeal.

If either of them is found to be valid, and to defeat the conviction, a verdict of not guilty is to be entered. Otherwise the conviction to remain.

W. ERLE.

Montague Chambers (with him *Clarkson* and *Parry*), for the defendant, contended with reference to the first point reserved, that the alteration in the deposition from Middlesex to Essex was fatal to the case for the prosecution. The case stated that the alteration was made before the depositions were used, but not before they were sworn; and any such alteration of an instrument required to be upon oath would, of course, destroy its validity, at least with reference to its altered form.

ERLE, J.—I, of course, meant to state on the face of the case, that I was satisfied the alteration was made before the deposition was sworn.

Chambers contended that the case would scarcely bear that construction, but that, at all events, there was not at the trial the slightest evidence to establish that fact.

PARKE, B.—Surely the presumption is that the alteration was made before the affidavit was sworn.

JERVIS, C. J.—I think the case sufficiently states the fact, but is not the rule, with regard to alteration, this, that where such alteration of a document, after it is complete, would be an offence cognizable by law, it is to be presumed (in the absence of evidence to the contrary) that it was made when it legally might be made?

Chambers then, with reference to the second point reserved, contended that, under the 94th and other sections of the Bankruptcy Act, the commissioner to whom the petition was originally allotted had alone jurisdiction to act in future proceedings.

By the 10th section the court was directed to sit daily, and then there was a proviso, that where a country commissioner could not attend, the registrar should sit for him. Another proviso declared, that during vacation the commissioners in London might regulate the attendance of each other where the attendance of any commissioner was needed. This showed that, except under the circumstances mentioned, each commissioner must exclusively deal with the petitions allotted to him.

JERVIS, C. J.—By sect. 6, each commissioner separately forms the court.

Chambers adduced that section as a strong argument in his favour; so soon as any petition was allotted to a commissioner, he became the court that had cognizance of the particular bank-

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ruptcy, and any other commissioner could no more interfere with the case, than a judge of the Court of Queen's Bench could, except under particular circumstances, try a case in the Common Pleas.

As to the third point:

Chambers contended that the notice to produce was, under the circumstances, not sufficient to let in secondary evidence of the summons to appear. In the first place it was erroneous to treat this as a mere notice, so as to bring it within the rule that no notice to produce a notice was necessary. It was, in fact, a summons, and it was essential to prove that it was duly served under such circumstances as would raise a fair presumption that it had come to the bankrupt's hands. Even the contents of a notice as such could not, under all circumstances, be proved without the service of a notice to produce: (*Robinson v. Brown*, 16 L. J. 46, C. P.) If, then, this was such a document that the original must be proved or sufficiently accounted for before secondary evidence was admissible, it must have been proved either that it presumably came to the hands of the defendant, and that a notice to produce was served; or else that there had been a sufficient search made, and that the document might be taken to be lost. Now the case almost excluded the possibility that it could have come to the hands of the defendant. It was deposited in the counting-house, which was in the possession of the assignees, and was then locked up, and there was nothing to show that the bankrupt could ever have had access to it.

PARKE, B.—On the part of the prosecution, it is said that no notice to produce was necessary. It was merely given *ex abundanti cautela*. If they had proved nothing but the search, then you might have said that the presumption was that the summons came to the hands of the defendant, and that therefore there ought to have been a notice to produce. If there is a presumption at all, surely it is that the summons came to his hands. He and his partner were the only persons that had an interest in it, and, therefore, it may be taken that some person about the office gave it to him.

Chambers contended that nothing on the face of the case could lead to such a conclusion, but, on the contrary, the premises appeared never to have been out of the control of the assignees. If, then, no such presumption as that suggested could be raised, had there been any sufficient search for the original, so as to let in secondary evidence?

JERVIS, C. J.—It was proved that the office was searched, and that the document could not be found. It is the ordinary mode of introducing secondary evidence, to show an unsuccessful search in the last place of deposit. I have heard Mr. Justice Maule frequently say, that he thought the practice in this respect had been much overstrained. The rule was, not that every place should be searched in which the document might possibly be, but that reasonable exertions should have been used to find it.

PARKE, B.—And whether such exertions have been used is a question exclusively for the judge.

Chambers submitted that this was not so where the objection was taken, and the point reserved. For all that appeared, the document might be somewhere upon the premises at that very moment:

As to the fourth objection:

Chambers argued that was much as the advertisement in the *Gazette* described West Ham Lane to be in the county of Middlesex, in accordance with the description in the proceedings before the alterations before referred to were made the act of Parliament had not been complied with. The *Gazette* was the first document that mentioned any days for surrendering, and, therefore, was the foundation of the charge contained in the indictment. In a case reported in *Montagus Digest* (p. 78) the bankrupt was described as of Copthall Buildings, instead of Copt-hall Court, and it was held bad.

PARKE, B.—There, I think, it was proved that there was another place of the same name.

Chambers.—In the same page of the same book the bankrupt was described of one parish instead of another, with the same result. There, as here, there was no proof of any other place bearing the same name. In *Ex parte Marston*, in the same book (page 78), the bankrupt was described of two places instead of one, and it was held to vitiate the proceedings. *Ex parte Beckwith*, 1 Gl. & Jameson, was to the same effect.

JERVIS, C. J.—May not the distinction between what is void, and what is voidable merely, apply here. Supposing the variance to be sufficient to supersede the bankruptcy, still, until it is actually superseded, the validity of the proceedings cannot be questioned.

Chambers contended, that his objection went to the very root of the charge, because the bankrupt seeing the advertisement, and recognising the informality, might naturally suppose that there was no crime on his part in not obeying the requisition.

As to the fifth point:

Chambers contended, that there being two days for the surrender, one of them had passed before the summons was left at the bankrupt's place of business, so that in fact he was required to do an impossibility. The act intended to give the bankrupt a certain time in which to surrender, namely, from the first day to the last, and unless this period was assigned to him, he committed no offence in not appearing to the summons. If the service was available after the first day had passed, then it might take place a day before the second, so as to render it impossible for the bankrupt to make his appearance in time.

JERVIS, C. J.—The service must of course be a reasonable service; and it would be a question for the jury, whether the bankrupt had had a fair opportunity of surrendering, and that his disobedience was therefore wilful.

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Chambers said, that the same topic might be urged as he had urged previously, namely, that the bankrupt might be misled into the belief that he could not be made responsible for disobeying what it was impossible he could fully comply with: (He referred to *Ex parte Wood*, 1 Atkins 221, and *Ex parte Bold*, 2 Brown, 9.) As to the sixth point, he urged that the summons was by a commissioner having no authority to issue it; and secondly, that the commissioner, before whom the bankrupt was required to appear, did not sit on the day named. The summons required the bankrupt to appear, not before the court, but before Mr. Commissioner Goulburn; so that if he had attended at the proper time he could not have obeyed the order.

The argument on the seventh point is subsequently given.

As to the eighth point:

Chambers contended, that the intent found by the jury was not the intent contemplated by the 251st section. At the time the bankrupt left the country, it was not certain that he would ever be made a bankrupt, and of course no offence could then be committed by him with reference to this act of Parliament. How then could the occurrence of circumstances subsequently, of which he remained in entire ignorance, make that a crime which was not one before? The intent to defraud must be with reference to the bankruptcy, and there was nothing to show that he was even aware of its existence. If the Legislature were to say that the doing, or the omitting to do, a certain act, with or without knowledge of the necessity, should be an offence, a person must take the consequences of doing or omitting to do the particular thing, however ignorant he might be of the circumstances which constituted the duty on his part. It might be that when this statute said, that service of notice in a particular way should be good service, such service might be good as a notice, although it absolutely excluded knowledge on the part of the accused; but, where a particular intent must be proved, the circumstances which are the foundation of the charge must be brought to his knowledge, or the intent could not be established.

PARKE, B.—The charge here is, that the defendant did not surrender, and that allegation must be proved.

Chambers submitted that the intent to defraud applied to all the clauses in the section which created offences: (*R. v. Hill*, 1 C. & K. 168; *R. v. Hilton*, 2 Cox Crim. Cas. 318.)

PARKE, B.—Those cases were before this statute.

Chambers admitted that it was so, but the sections were the same, except that in the Bankrupt Consolidation Act, after the clause relating to the non-surrender, the words "having no lawful impediment proved to the satisfaction of the court at such time, and allowed by the court by a memorandum thereof then made on the proceedings," were added. This would make no essential difference in considering the present point.

JERVIS, C.J.—Is it quite clear that the intent to defraud in the 251st section has reference to anything more than the last antecedent?

Chambers.—In each of the cases quoted two judges put that construction on the section.

JERVIS, C. J.—As the court is unanimous as to all the objections except the seventh, we will give judgment at once upon them, and the seventh must be reargued before all the judges on a future occasion.

As to the first objection, that there are in various documents errors and interlineations. The case finds that they were made before the documents were used; but Mr. Chambers says, that with respect to some of them, it is not so found. The rule is, that wherever the alteration would involve fraud or misconduct, the presumption is, until the contrary is proved, that fraud or misconduct was not committed, and that the alteration was made at proper time. The only exception is in the case of wills. The alteration here, after the documents were used, would certainly involve fraud, and therefore it is unnecessary to consider whether the case is conclusive on the point or not.

The second objection is, that there are many courts of bankruptcy in the city of London, and that each commissioner, when a particular bankruptcy is allotted to him, becomes a separate and exclusive court for carrying it out. But I think this is not so. The 94th section requires there should be an allotment of every petition to a commissioner, and that it should be then transmitted to the registrar attending such commissioner. This is merely directory, and for the convenience of business; and, even though it were wrong that another commissioner should act, it would not render the proceedings void, though it might render those irregularly taken, voidable. The 6th section, however, expressly enacts, that each commissioner shall have the full power of the court, and shall in fact be the court. And the 19th section, authorizing the Lord Chancellor to appoint a London Commissioner to act in the country, was merely for convenience. A commissioner acting for another in London, is on the same principle as a judge of any one of the superior courts sitting at chambers during vacation, and transacting the business not only of his own but of the other courts also.

The third objection is, that the service of the adjudication is imperfect. I think that the service was good, and that there was good evidence of such service. It is immaterial to consider whether this is a mere notice, or something more. The rule of practice is, that the best evidence shall be given that it is reasonably in the power of the parties to give, and that rule has been complied with. The original document must be produced if the party can produce it; if not, evidence must be given of reasonable exertions having been used to find it. Here the document was left at the bankrupt's last place of business. There is a presumption, therefore, raised of one of two things; either that the bankrupt has got it, and then notice to produce has been given, or else it has been destroyed, and then secondary evidence of the contents has been given. If this were not so, it would be impossible to exhaust all the means of inquiry that ingenuity

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might suggest. The exertions must be reasonable ones, just as in a case where a document would, under ordinary circumstances, be in an attorney's office, it is sufficient to call the attorney's clerk to prove that he has searched for it, and cannot find it.

The fourth objection is with regard to the variance between the particulars of adjudication and the publication of them in the *Gazette*, and it seems to be contended that, if the defendant really did see the *Gazette*, he might, by reason of the variance, be convinced that the proceedings did not relate to him. This is a case in which the false demonstration could do no harm. If he saw the *Gazette*, it is impossible to believe that he could doubt its relating to him. The cases cited have all reference to attempts made to supersede commissions, and the courts, in the exercise of their discretion, seem to have held the parties to a considerable amount of technical strictness. But this is a totally different matter. Here the bankruptcy has not been superseded, and the proceedings must therefore be taken to be valid. I may mention, too, that, with respect to the strongest case quoted for the defendant, the text writers do not seem to have entirely approved of the decision.

The fifth objection is—1st, that the summons was by Commissioner Holroyd to appear before Commissioner Goulburn, but this has been already disposed of; 2ndly, that the bankrupt was to appear on two specific days, and that one of those days had expired before the notice was served. The answer is, that by the 251st and the 104th sections, it is clear that the defendant was to appear at the time limited for his surrender, and that the time limited expired on the latter of the two days.

The sixth objection has been disposed of in deciding on the second. It is that on the day limited for the surrender, Commissioner Goulburn did not sit at all. If one commissioner can sit for another, the objection fails. We think that the surrender should have been to the court, and the commissioner actually sitting constituted a court for that purpose.

As to the eighth objection, that there was no evidence that the defendant had actual knowledge of the adjudication and of the summons to surrender, and therefore could not have absented himself with intent to defraud his creditors, I think it is decided by the case itself. The jury have found that the bankrupt stayed abroad with the intent to defraud his creditors by depriving them of their right to examine him and to make him responsible; I think that this is a sufficient intent within the meaning of the statute, and that it is quite unnecessary to decide whether the words "with intent to defraud" override the various clauses of the section; neither is it necessary to give any opinion on the two cases quoted on this subject, although, had I to decide upon the point, I might think it right to reconsider the matter, with reference to the present statute, as the words are not the same as those in the former ones.

The seventh objection will be reargued.

On November 30th, the case was reargued, so far as the seventh objection was concerned, before Campbell, C. J., Jervis, C. J., Parke, B., Alderson, B., Wightman, J., Cresswell, J., Erle, J., Platt, B., Williams, J., Crompton, J., and Willes, J.

Montague Chambers, Q. C. (*Parry* and *O. B. C. Harrison* with him), for the defendant.—The question turned on the 104th and 251st sections of the Bankrupt Act. It was a rule in bankruptcy law, in the case of partners, that there could not be a joint fiat unless each was dealt with as a separate individual. The 251st section used the words that, “after notice thereof in writing to be served upon him personally, or left at the usual or last known place of abode or business of such person, or personal notice in case such person be then in prison,” &c. By the 112th section the bankrupt was protected from arrest in coming to surrender; and by the 112th and 113th sections he was privileged, after surrendering and obtaining the indorsement of the court upon his summons, upon the production of it to the officer. Each bankrupt, where there were two, would, upon coming to the place where the notice had been left, be entitled to take it to the court for indorsement, and then to keep it about him as a protection to be shown to any officer arresting him. But, where there is but one summons, the second bankrupt would have no document by which he could protect himself.

It could not be argued that, where the notice was served personally, one would be sufficient; and why should not two be also requisite where it was left at the last place of abode or business? If the construction contended for was the right one, then a notice served on A. in London, or left at his last place of abode, would be a good notice to B. in Brighton. The 78th section provided for summoning traders to the Court of Bankruptcy at the instance of a creditor. There was in that section a specific provision for the case of partnership, and by it a delivery of the account and notice to any one of the partners personally, or to some adult inmate at his usual or last known place of abode or business, and also at the place of business of the firm was sufficient. In the case of a felony created by the same statute, the Legislature could not have intended to make a less notice sufficient. By the interpretation clause, sect. 276, there was the usual direction, that the singular number should be taken to include the plural, and therefore “notice” would mean “notices” where there were more bankrupts than one.

In *R. v. Cheshire*, JJ. (11 A. & E. 139), it was held, in an appeal against a conviction, that, although one justice only had signed the conviction, notice of appeal ought to have been given to those who were present.

Bramwell, Q. C. (*Poland* with him), for the prosecution.—It seemed to be assumed in the argument that a summons was absolutely essential. But that was not so. A notice was all that was required, and the statute directed how that notice was to be given, and in the present instance that direction had been complied with. The notice had been left at his place of business, and, no doubt,

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the Legislature had intentionally used the language it had used, as the bankrupt might always be presumed to be in communication with the persons who were there.

PARKE, B.—The statute points out five modes by which the notice can be given: by *personal service*, by leaving it at the *usual* or *last* known place of *abode* or *business*. All these provide a good and reasonable chance of the bankrupt getting it. Your argument is, that a mere form should be gone through without allowing him such reasonable chance.

Bramwell contended that there was nothing in the 251st section that required the bankrupt to have actual knowledge of the circumstances of the case. It prescribed a mode of serving the notice, and, if that was done, the knowledge was presumed. Leaving the notice at the place of abode was necessarily a leaving for the person. It was clearly intended that a felony might be committed, without the person committing it knowing everything that had taken place in the matter, because it makes good a service not personal. A man who was in a situation to be adjudged bankrupt, ought to be in expectation that that would be done, and to take measures for being made acquainted with it. A notice to be left at the last place of his abode, which he might have long since quitted, was enough. The Legislature seemed to have contemplated the case of intentional absence, and to have meant to have rendered that unavailing.

Chambers replied.

LORD CAMPBELL, C. J.—I think this objection is fatal. The 251st section of the Bankrupt Law Consolidation Act creates a felony punishable with transportation for life, and that felony is committed by any person adjudged a bankrupt not surrendering himself upon the day limited for his surrender. This, however, is subject to a condition which is very carefully worded. The offence cannot be committed by any person until “after notice thereof in writing, to be served upon him personally, or left at the usual or last known place of abode or business of such person, or personal notice in case such person is then in prison.” The question then is, there having been a joint adjudication against two bankrupts, both having the same place of business, whether one notice left at that place of business is sufficient service on both the bankrupts, the defendant saying that a separate and distinct notice ought to have been left for each. It is clear that, as far as personal service is concerned, there must be a separate and distinct service on each bankrupt whenever that mode of service is resorted to; and similarly, when the service is at the last place of abode, it must be one at the last place of abode of each. The same reason and sense apply to the remaining mode of service. It is of great importance that, before such an offence as that which is created by this statute is consummated, there should be the best chance that the person to be charged with the offence should receive the notice directed by the statute. If that be so, the intention of the Legislature must have been that, when there is more than one bankrupt, each

should have a notice, although all may have one and the same place of business. This may easily be done; and, if the other construction ought to be put upon the statute, it might happen that one of several bankrupts would go to the place of business, find the single notice, and carry it away with him, leaving the others without the means of knowing that such a notice had ever been left. Each bankrupt, by having possession of a notice, will have the opportunity of perusing it and consulting his legal advisers upon it, and it serves to remind him of the day and hour limited for his surrender, and of the penalty which he will incur by not surrendering. On these grounds it appears to the majority of us that, when the adjudication has been against two or more persons, there must be a separate and distinct notice to each of them.

JERVIS, C. J., was of opinion that one notice was sufficient, and that the conviction was right.

PARKE, B., was of opinion that the Legislature intended that there should be a separate notice for each bankrupt that each might have a reasonable chance of receiving it.

ALDERSON, B., WIGHTMAN, J., and CRESSWELL, J., thought the conviction wrong.

ERLE, J., was in favour of the conviction.

PLATT, B., thought one notice sufficient, and that the statute had been complied with. As the bankrupts had fled the country, and were abroad when the notice was left, no inconvenience could follow to them from there being but one notice.

WILLIAMS, J., and CROMPTON, J., agreed with the majority of the court.

WILLES, J., thought that the conviction should be affirmed. He referred to the fact that no notice in writing was required by the 251st section of 12 & 13 Vict. c. 106, where the bankrupt is in prison, and inasmuch as the words "notice in writing" appear for the first time in the 251st section, he thought they were not meant to limit the offence.

Conviction quashed.

Bramwell, Q. C., Ballantine, and Poland for prosecution.

Chambers, Q. C., Clarkson, Parry, and Harrison for defence.

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COURT OF QUEEN'S BENCH.

January 26, 1856.

REG. on the Prosecution of SINNOTT v. FREKE.

Turnpike-road—Toll—Exemption—Manure.

A horse and cart employed by a dust-contractor in conveying street sweepings (found in the case to be manure) from the city to a place of deposit, partly for the contractor's own use as manure, but principally for the purpose of sale as manure, was held to be within the following exemptions from toll in a turnpike act: "for any horse or other cattle or carriage employed in carrying or conveying (among other things) manure employed in husbandry for manuring or improving the land."

THIS was a case reserved by the Recorder of Bristol at the borough sessions on the hearing of an appeal against a conviction of justices for nonpayment of toll, when the Recorder quashed the conviction, subject to the opinion of this court.

It appeared that Sinnott, the appellant, was a dust-contractor, and, under a contract with the local board of health of the district in Bristol, was employed to remove the street sweepings. It was found that street sweepings were manure, and that Sinnott was accustomed to, and was at the time of the demand of toll in question engaged in carrying street sweepings from Bristol to a place of deposit which he had without the city adjoining the turnpike-road. He took there about 100 tons of street sweepings weekly, and used some part for manuring a small piece of land of his own about two and a-half acres, and sold the rest for manure from time to time as customers applied for it. At the time when the toll ($4\frac{1}{2}d.$) was demanded, Sinnott's horse-cart was conveying street sweepings from the city through the West Gate Bar, at which Freke, the defendant, was collector; and toll being refused, Sinnott was summoned and convicted, which conviction was afterwards, on appeal at the borough sessions, quashed as aforesaid.

The following are the material statutory provisions.

The 59 Geo. 3, c. xcvi. (An Act for repairing, widening and improving the several Roads round the City of Bristol, and for making certain new Lines of Road to communicate with the same), by sect. 25 empowers the trustees to take tolls upon horses, carts,

carriages, &c., in the usual form, and then by sect. 40 provides for exemptions from such toll.

That section exempts persons from toll for any horses or carts, &c., employed in carrying or conveying, or going empty to fetch, carry, or convey, &c., any stones, gravel, &c., or other materials for making and repairing the said roads; "or in carrying or conveying any seed for seeding the ground, or hay, grass, sainfoin, fodder, &c., for the use of the owner, and not for sale or not sold or disposed, but passing to be laid up or placed in the houses, barns, outhouses, or yards, or on the lands of the owners thereof, or for the use of the owners thereof; or for any horse, beast or other cattle, or carriage employed in carrying or conveying or going empty to fetch, &c., or returning empty, &c., having been employed only in carrying or conveying on the same day, any ploughs, harrows, or implements of husbandry (unless laden also with some other thing not exempted from toll), or any mould, dung, soil, marl, manure or compost, employed in husbandry for manuring or improving the land," &c.

Then by the 5 & 6 Will. 4, c. 18 (public), *An Act to exempt Carriages carrying Manure from Toll*, it is provided by sect. 1, that no toll shall be demanded or taken on any turnpike road for or in respect of any horse, &c., cattle or carriage, when employed in carrying or conveying only dung, soil, compost or manure for land (save and except lime), and the necessary implements used for filling the manure, and the cloth that may have been used in covering any hay, clover or straw, which may have been conveyed.

Prideaux, in support of the order of sessions.—The case finds that these sweepings are manure, and the only question is the liability to toll when they are being conveyed to a place of deposit for sale, and not for actual and immediate use upon the land. The final destination of the sweepings was for improving and manuring the land, and if so, they fall within the exemption in 59 Geo. 3, c. xcv. s. 40. That is still more clear from the 5 & 6 Will. 4, c. 18, s. 1. It has been decided that uncrushed bones which are taken through a turnpike to a farm to be there crushed, and part of them there used as manure, and the residue to be afterwards sold and to be used as manure at other places, are exempt from toll under 3 Geo. 4, c. 126, s. 32, and 5 & 6 Will. 4, c. 18, s. 1: (*Pratt v. Brown*, 8 C. & P. 244; and in *Higginbotham v. Perkins*, 8 Taunt. 801, Dallas, C. J., said that an exemption in favour of agriculture is to be beneficially construed.)

Welsby, contra—This is a farmer's exemption, and depends upon whether, at the time of toll demanded, the sweepings were being conveyed for manuring the land. The rule is, that a toll must be imposed by clear terms, and it is so by sect. 25 of 59 Geo. 3, c. xcv. That being so, the exemption relied on must also be made out by clear terms. Now, if this exemption is allowed, it must be also allowed in the case of a cart carrying "guano" to a place of deposit, to be sold again. [LORD CAMPBELL, C. J.—Yes,

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that "guano" may be cheap; for the exemption is for the benefit of agriculture.] This exemption was not made in favour of the dealer in manure, but only in favour of the farmer. [WIGHTMAN, J.—In the previous part of sect. 40, exempting from toll the carriage of seeds, hay, fodder, &c., it is limited that they shall be for the use of the owner, and not for sale. There is no such limitation in the part as to manure.]

LORD CAMPBELL, C. J.—I am of opinion that the recorder took a just and correct view of the statute in quashing the conviction. The words of the exemption are, "for any horse, &c. employed in carrying or conveying manure employed in husbandry, for manuring or improving the land." It is allowed that this is manure; and "employed in husbandry for manuring the land" must mean "to be employed." That was the object and destination of this manure; it was to be employed in manuring the land. I am of opinion that this exemption was properly claimed; and this exemption being for the benefit of agriculture, that is as much affected by this case being exempted from liability to toll as by the case where the manure is being actually conveyed by the farmer to be laid on his own land.

The rest of the court concurring,

Order of sessions confirmed.

COURT OF CRIMINAL APPEAL.

November 24, 1855.

(Before JERVIS, C. J., PARKE, B., WIGHTMAN, CRESSWELL, and WILLES, JJ.)

REG. v. DIXON AND ANOTHER. (a)

*Larceny—Finding—Lost note—Means of discovering owner—Prisoners' belief that the owner could be traced.**In order to convict the finder of a lost chattel of larceny, it must be proved that at the time of the finding there was either the owner's name upon it, or that something occurred which would give the prisoner at the moment the means of knowing who the owner was.**Upon an indictment for stealing a note it was found by the jury that the note was lost by the prosecutor and found by the prisoner. There was no evidence that the note had any name or other mark upon it indicating to whom it belonged; nor was there evidence of any other circumstances which would disclose to the prisoner at the time when he found it the means of discovering the owner.**Held, that he could not be convicted of larceny, although the jury, being asked whether at or after the time of the finding he believed that there was not a reasonable probability that the owner could be found, had answered that he did believe that the owner could be traced.*

THE prisoners were indicted for felony at the Leeds Borough Sessions, holden before the Recorder of that borough on the 23rd day of October, 1855. The indictment contained three counts. The first count charged the prisoners with feloniously stealing, from the person of John Grimshaw, money to the amount and value of 38*l.* 10*s.*, and one cotton purse of the value of 1*s.*, of the goods, moneys, and chattels of the said John Grimshaw. The second count charged them with feloniously stealing money and purse (described as before). The third count charged them with feloniously receiving money and purse (described as before) then lately before feloniously stolen, knowing them to have been feloniously stolen. Both prisoners pleaded not guilty to all the counts, and issue was joined on the part of the Crown.

The case was tried at the said Sessions before the said Recorder

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and a jury. No evidence was given sufficient to support any of the charges against Mary Ann Lee. As to William Dixon the following facts were proved. John Grimshaw, about four in the afternoon of the 4th day of September last, being then in the town of Leeds, placed in a black purse seven five pound notes, three sovereigns, and three shillings. He at that time put this purse in an inside pocket of a waistcoat which he then had on. He did not see either the purse or the money again before he discovered, as after mentioned, that he had lost them. About eight o'clock in the same afternoon he quitted a public house where he had been drinking, and at that time he felt his purse in the pocket in which he had placed it. He was then not sober. He afterwards left Leeds by a railway train which arrived at Bradford soon after ten o'clock that afternoon, and on his arrival there he found that he had not the purse or the money. He returned to Leeds early on the next morning, and communicated the facts to the police. About eleven o'clock in the evening of the same 4th day of September last, William Dixon was seen in possession of two of the five pound notes which had been placed in the purse by John Grimshaw; William Dixon changed one of these two notes, and endeavoured to change the other, but was not able to do so. On the next morning, between seven and eight o'clock, William Dixon attempted to change one of the notes that had been placed in the purse by John Grimshaw. A policeman, under the belief that this was a forged note, asked William Dixon where he had got that note and the note which he had changed on the preceding night. William Dixon answered that he had found both last night in the Croft. The Croft is an open area in a much frequented part of Leeds, and there was full time for John Grimshaw to have been in the Croft between the time of his leaving the public house and that of his coming to the railway at Leeds on the said preceding night.

The counsel for William Dixon urged to the jury that the story told by William Dixon was probably true, and that John Grimshaw had probably lost the purse and money in the Croft. It was not disputed that William Dixon, if he found the money, intended at and always from the time of finding it, to appropriate it; but the counsel contended that on this supposition William Dixon was entitled to an acquittal on all the counts.

The jury stated that they were of opinion that the purse and money were not stolen from John Grimshaw's person, but lost by him, and found by William Dixon.

The Recorder then desired them to consider four questions, namely,—

First. Whether John Grimshaw had intentionally abandoned his right to the money.

Secondly. Whether William Dixon at or after the time of his finding the money believed that the owner had abandoned his right to the money.

Thirdly. Whether there was or was not reasonable probability

at and from the time of the finding that the owner could be traced.

Fourthly. Whether at or after the time of the finding William Dixon believed that there was not reasonable probability that the owner could be found?

The jury answered the first two questions in the negative, and the third in the affirmative, and as to the fourth they said that they were of opinion that William Dixon did believe that the owner could be traced.

The Recorder then, at the request of the counsel for William Dixon, put three more questions to the jury, namely,—

First. Did the owner know where to find the money?

Secondly. Had William Dixon reason to know to whom the money belonged?

Thirdly. Did William Dixon reasonably believe that the owner knew where to find it?

The jury answered all the last-mentioned three questions in the negative.

The opinion of the Recorder upon all the questions of fact coincided with that of the jury, and he told the jury that upon their view of the facts William Dixon was guilty of the offence charged in the second count.

The jury found that Mary Ann Lee was not guilty of any of the offences charged in the indictment, and that William Dixon was guilty of the offence charged in the second count, and not guilty of any other offence charged in the indictment.

The Recorder sentenced William Dixon to be imprisoned and kept to hard labour in the Leeds Borough House of Correction for the space of five calendar months, but respited the execution of the judgment. William Dixon not being able to give bail was committed to the said house of correction until the question hereafter mentioned should have been considered. He is still confined in the said house of correction.

The question for the opinion of the Justices of either Bench and the Barons of the Exchequer is, whether the prisoner ought to have been so convicted as aforesaid under the circumstances above mentioned.

No counsel appeared on the part of the prisoner.

Pickering, in support of the conviction, contended that the answer of the jury to the fourth question distinguished this from *Thurborn's case*: (1 Den. C. C. 387; S. C., nom. *R. v. Wood*, 3 Cox Crim. Cas. 453.)

PARKE, B.—I do not see what evidence there is to give occasion to those questions. The note had no name upon it, nor did the prisoner see it fall from the prosecutor; and there was nothing to show the prisoner, at the time when he took it up, that the owner could be discovered.

Pickering.—But the jury have found that he did so believe.

PARKE, B.—Probably, if he took sufficient pains, a man might always trace the owner of a lost note.

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CRESSWELL, J.—The jury have not found that at the time of taking up the note he so believed.

Pickering.—The meaning of the answer to the fourth question is, that he so believed from the first.

PARKE, B.—No; the verdict is not satisfactory upon that point. The question is, whether at the time of finding the note there are circumstances appearing whereby the owner can be found. In this case it is quite consistent with the answer of the jury that the prisoner may not have believed that the owner could be traced at the time when he took it up; and any belief or knowledge acquired afterwards would be immaterial.

Pickering.—In *R. v. West* (b) (1 Dearsley, C. C. 402; 6 Cox Crim. Cas. 417) it seems to have been considered that some endeavours to discover the owner should be used.

PARKE, B.—That was not a case of lost goods, and the decision proceeded upon that ground.

JERVIS, C. J.—We are all of opinion that the conviction must be quashed.

Conviction reversed.

(b) *Reg. v. West.* A purchaser by mistake left his purse on the prisoner's market-stall, without himself or the prisoner knowing it. The prisoner afterwards seeing it there, but not at the time, knowing whose it was, appropriated it, and subsequently denied all knowledge of it when inquiry was made by the owner. Held, guilty of larceny. Jervis, C.J., saying, "if there had been any evidence that this was lost property properly so speaking, a further question should have been put whether proper endeavours were made by the prisoner to find the owner. But there was no reasonable ground here for supposing that the purse was lost. There is a clear distinction between property put down and left as this purse was, and property lost." Those are the words attributed to Jervis, C. J., in the report of the case, 24 L. J. 4, M. C.; but according to the report in 6 Cox Crim. Cas. 417, the words used were, "If the evidence had shown that this was lost property, the question ought to have been put to the jury whether the prisoner had reasonable means of finding the owner, or reasonably believed that the owner could not be found."

COURT OF CRIMINAL APPEAL.

November 24, 1855.

(Before JERVIS, C.J., PARKE, B., WIGHTMAN, CRESSWELL, and WILLES, JJ.)

REG. v. ROBERTS. (a)

Coining—Procuring dies with intent to make foreign coin—Misdemeanor—Attempt to commit felony—Stat. 37 Geo. 3, c. 126, s. 2.

It is a misdemeanor at common law to make or procure dies, having engraved thereon the obverse and reverse sides of a foreign coin, with intent therewith to make such coin; for it is an act done with intent to commit and proximately connected with the commission of a statutable felony.

So, held, although it was found that a coining press and some other things, which the prisoner had not procured, were required for the completion of the felony; and that the prisoner only intended to make a few of the counterfeit coin in England by way of trying his apparatus.

WILLIAM ROBERTS was tried before Willes, J., at the Warwick Summer Assizes, 1855, upon an indictment containing several counts, to the effect following, that is to say:

First count.—For unlawfully, knowingly, and without lawful authority, or excuse, making and causing to be made, cut and engraved two dies, one of the obverse side, the other of the reverse side of a silver half dollar of Peru, not being coin current in this realm, with intent to use them, and by means thereof feloniously and against the form of the statute to make counterfeit Peruvian half dollars, and so attempting to make such counterfeit coin.

Second count.—Same as first, except a verbal difference in describing the dies.

Third count.—Same as first, only saying “obtained and procured,” instead of “made and caused to be made.”

Fourth count.—Same as second, with like difference as between first and third.

Fifth count.—For attempting feloniously and against the form of the statute to coin, as in first count, by making, &c., the dies with intent to use them in coining such counterfeit coins; and also

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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by procuring, &c., two galvanic batteries suitable and necessary for the purpose; and also by procuring, &c., acids and other chemicals suitable and necessary for the purpose.

Sixth count.—For attempting to coin half dollars of Peru (without stating the means).

So much of the indictment as appears necessary is copied in the accompanying paper, marked A., which may be referred to as part of this case.

It appeared at the trial that early in the present year (1855) the prisoner, without any authority or license so to do, ordered and caused to be made by, and procured of, William Johnson, a die-sinker at Birmingham, in Warwickshire, who, though he executed the order, gave notice to the police immediately upon receiving it, and committed no offence against the law in the transaction, the necessary dies for making a counterfeit half dollar, being a silver coin of a foreign country, namely, the Republic of Peru, not being a coin of, or permitted to be current in, this realm. The dies, though suitable and necessary for making such counterfeit coin, could not alone produce it, a press, copper blanks, galvanic battery, and a preparation of silver being also necessary for that purpose. The prisoner had procured galvanic batteries, and had been in negotiation for the purchase of a press and copper blanks for the aforesaid purpose, but he was not proved to have actually procured either press, blanks, or preparation of silver. The prisoner caused to be made and procured the dies in Birmingham, and intended to procure the rest of the necessary apparatus there for the purpose and with the intention of using the entire apparatus when procured, including the dies, in making counterfeit Peruvian half dollars, resembling the genuine coin; and the only disputed question of fact at the trial was, whether he intended to coin in Peru only, or whether he intended to coin also in this country.

There was evidence for the consideration of the jury on both sides of this question, and the learned counsel for the prosecution and the prisoner respectively addressed the jury upon it.

It was contended on behalf of the prisoner that there was no proof of the sixth count, charging an attempt to coin, the complete apparatus not appearing to have been procured; but as it was arranged that the question whether any such offence against the law as alleged had been committed should be reserved, I thought it better not to make a distinction between the counts at the trial.

It was further contended on behalf of the prisoner that the jury ought, upon the evidence, to find that he only intended to make the coin in Peru, and not in England, in which case it was argued that no offence against the laws of England had been committed.

It was further contended, on behalf of the prisoner, that even if he did intend to coin in this country, that intention, though coupled with the act of causing the dies to be made, and procuring them in pursuance of such an intention, fell short of an attempt to commit a felony, and therefore was not an offence.

I told the jury, *inter alia*, that if the intention of the prisoner in procuring the dies was to procure the necessary apparatus complete, and therewith, including the dies, to make any number, however small, of counterfeit Peruvian half dollars resembling that coin, even one in England, the unauthorized causing to be made and procuring the dies in pursuance of and with a view to carry into effect that intention, would, in my opinion, be a misdemeanor.

The jury stated it to be their opinion that the intention of the prisoner was to cause to be made and procure the dies and other necessary apparatus in order therewith to coin counterfeit Peruvian half dollars, and to make a few only of the counterfeit coin in England, by way of trying whether the apparatus would answer before sending it out to Peru, to be there used in making the counterfeit coin.

I directed the jury, if they thought that the dies were caused to be made and procured by the prisoner as already mentioned, in pursuance of, and in order to effect that intention, to find the prisoner guilty, which they accordingly did.

I thereupon postponed the judgment until the next assizes, admitting the prisoner to bail, and reserved for the opinion of the Justices of either Bench and Barons of the Exchequer, according to the statute, the following questions, which arose at the trial, namely:

Whether the prisoner, by so causing to be made and procuring the dies as aforesaid, with the intention of using them, together with the rest of the necessary apparatus, when procured, in coining a few counterfeit Peruvian half dollars in England, in order to try the apparatus before sending it to Peru, to be there used for making the counterfeit coins, was guilty of an offence against the law of this country? and,

Whether any or either of the counts of the indictment alleged such an offence? (See 37 Geo. 3, c. 126, s. 2, and *Dugdale v. The Queen*, 1 E. & B. 435. (b))

O'Brien (with him *Brewer*), for the prisoner. 1. All the counts of this indictment charge an attempt to commit a statutable felony, and the acts charged and proved do not amount to an indictable attempt. There are to be found in the books certain dicta to the

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(b) The marginal note of that case is: "It is a misdemeanor to procure indecent prints with intent to publish them. But to preserve and keep them in possession with such intent is not a misdemeanor." Lord Campbell, C. J. said "We have decisions on both sets of counts. *Reg. v. Heath*, Russ. & R. 184, shows that those counts cannot be supported, which merely charge a possession with intent to publish; the mere intent cannot constitute a misdemeanor when unaccompanied with any act. The case is precisely in point. But as to the counts which charge a procuring with intent to publish, we find that in *Reg. v. Fuller*, Russ. & R. 306, in Easter Term, 1816, all the judges were of opinion that the procuring counterfeit coin with intent to utter, was a misdemeanor, and that this might be evidenced by the possession. Must not the law be the same as to the publication of indecent prints? The circulation of counterfeit coin is a statutory offence; the circulation of indecent prints is punished at common law for the protection of morals. The procuring of such prints is an act done in the commencement of a misdemeanor, the misdemeanor being the wicked offence of publishing obscene prints." Coleridge, J. added, "the law will not take notice of an intent without an act. Possession is no such act, but procuring with the intent to commit the misdemeanor, is the first step towards the committing of the misdemeanor."

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effect that every act done towards the commission of an indictable offence is itself indictable; but that position cannot be supported. *Dugdale v. The Queen* (1 E. & B. 435), is perhaps the strongest case; but that proceeded upon the authority of *R. v. Fuller* (Russ. & Ry. 308), and the whole doctrine appears to have originated in *R. v. Sutton* (2 Stra. 1074), which case was afterwards reversed by the case of *R. v. Heath* (Russ. & Ry. 184.) Except with respect to high treason in ancient times, the maxim of the civil law that *voluntas reputabatur pro facto*, has not been admitted into the criminal law of England; but in *R. v. Sutton*, the court said, "the intent is the offence." [JERVIS, C. J.—That is so, the act is evidence of the intent; but the guilt is in the intent.(c)] If the doctrine can be upheld in the terms in which it is stated in some of the cases, then a man who has formed the intention of committing an offence, would be indictable for leaving his own house for that purpose, although the next minute he should abandon the design. The most recent case on this subject is *R. v. Eagleton* (6 Cox Crim. Cas. 559, 571; 24 L. J. 158, M. C.), and there Parke, B., in delivering the judgment of the court, says, "the mere intention to commit a misdemeanor is not criminal, some act is required, and we do not think all acts towards committing a misdemeanor indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts connected with it are, and if in this case, after the credit with the relieving officer for the fraudulent overcharge *any further step* on the part of the defendant had been necessary to obtain payment, as the making out of a further account, or producing the vouchers to the board, we should have thought that the obtaining credit in account with the relieving officer would not have been sufficiently proximate to the obtaining the money. But on the statements in this case, no other act on the part of the defendant would have been required. It was the last act *depending upon himself* towards the payment of the money, and therefore it ought to be considered as an attempt." In order, therefore, to render an act indictable as an attempt, the person charged must have proceeded so far towards the completion of the offence, that the very next act to be done by him would be the complete offence. This is a reasonable limitation of the doctrine, for otherwise the procuring of paint with intent to paint indecent pictures for sale, or of materials for a net to poach with, would be indictable; and, if so limited, the doctrine does not apply to the present case, because the defendant must have done several other acts before he could have completed the offence of coining. He had not procured some of the necessary materials. [WIGHTMAN, J.—But the dies would not be applicable to any other purpose than that of making the coin.] Still the act itself is indifferent, they may be used for a lawful

(c) The court said in *R. v. Sutton*:—"Here the intent is the offence, and the having in his custody an act that is the evidence of that intent;" and the only part of that decision which was overruled in *R. v. Heath*, was the latter part; it being considered that the merely having in possession was not an act.

purpose. In *R. v. Williams* (1 Den. C. C. 39), upon an indictment for attempting to poison, it was held not enough to have given the poison to a third person, in order that it might be administered to the prosecutor. [CRESSWELL, J.—But that decision turned upon the language of the particular statute creating the offence of attempting to poison.] The indictment would not be good without alleging an attempt to commit the felony; and the acts alleged and proved do not make out an attempt.

2. The finding of the jury disproves the offence altogether, because it shows that the defendant had no intention to commit the offence of coining in England. The statute only applies to a coining in England, and the making of a few coins here by way of experiment would not be a coining within the statute. The statute is directed against coining for the purpose of circulation, and the coining of a few by way of experiment would not be coining for the purpose of circulation. [JERVIS, C. J.—The statute is quite general, and is intended to prevent the making of counterfeit coin at all.] But the specimens would hardly come under the designation of counterfeit coin. [CRESSWELL, J.—What would they be then if not counterfeit coin?] Merely medals, unless intended for circulation. [PARKE, B.—You say they might be made as specimens for a gentleman's cabinet.] Yes. [WIGHTMAN, J.—I should pause before I held that the making of such coins even as specimens for a cabinet, was not an offence within the statute.] The court cannot take judicial cognizance that the coining of this money would be an offence in Peru. It may be a perfectly innocent act there, and, if so, can the mere trial of the implements in this country be an indictable offence? It is submitted that it cannot, and that the conviction is wrong.

Bittleston (*Cockle* with him), for the prosecution, was not called upon.

JERVIS, C. J.—I am of opinion that the conviction is right. This is not, as was the case in *R. v. Williams*, an indictment for a statutable attempt to commit an offence, but for the common law misdemeanor of doing an act towards the commission of an indictable offence. There does not appear to have been any direct attempt to coin, and if this had been a charge of a statutable attempt to coin, the prosecution would have failed; but here the indictment is founded upon the criminal intent coupled with an act. It is no doubt difficult, if not impossible, to lay down any definite rule, as to what is such an act done in pursuance of a criminal intent, as constitutes an indictable misdemeanor; and I will not attempt to draw the line; but there is no great practical difficulty in saying whether any particular case falls within or without the line. In this case I entertain no doubt that it falls within it. Merely walking towards a place with intention to commit a murder there, would not be indictable; but here the prisoner's intention being to coin half dollars of Peru, the procuring of the dies was intimately connected with that intention; and indeed could have been obtained and used for no other purpose.

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PARKE, B.—Between acts which are and acts which are not indictable, as being coupled with a criminal intent, the line of distinction cannot be exactly defined, though it is easy to tell whether a given case lies on one side of the line or the other. I agree that the law is as laid down in *R. v. Eagleton*, and that to constitute the misdemeanor the act done must be proximate to the offence intended. Merely going to Birmingham in order to procure dies, if he had not procured them, would not have been any act sufficiently proximate to the offence; but I think the act of procuring the dies to be made was sufficiently proximate to the offence of coining. They could not have been procured for any lawful purpose. A distinct attempt to coin need not be proved, except in the case of statutable attempts, as in *R. v. Williams*, which stand upon a different ground.

WIGHTMAN, J.—I am of the same opinion. It cannot be said that every act which is done in furtherance of an intent to commit an offence is itself indictable; nor is it possible to define very exactly what acts are so indictable. But according to the rule laid down in *R. v. Eagleton*, they must be acts connected immediately with the offence intended to be committed, and having no other object, and in the present case the procuring of the dies appears to me to fall within that rule.

CRESSWELL, J.—The cases of procuring coin with intent to utter them, show that a direct attempt to commit the principal offence is not necessary.

WILLES, J.—I expressed my opinion upon this case at the trial.
Conviction affirmed.(d)

(d) See *Scotfield's case*, Cald. 397; and *Reg. v. Higgins*, 2 East, 5; in which case (at p. 21), Lawrence, J. said: "The offence does not rest in mere intention; for in soliciting Dixon to commit the felony, the defendant did an act towards carrying his intent into execution. It is an endeavour or attempt to commit a crime. The argument, therefore, for the defendant must go the length of showing that an endeavour or attempt to commit a felony is no offence, not even a misdemeanor, if the felony be not committed: for if the felony had been committed by the servant, the defendant himself would have been a felon. The doctrine laid down by Lord Mansfield in *R. v. Scotfield*, which comprises all the principles of the former decisions, entirely governs the present case; that so long as an act rests in bare intention, it is not punishable by our laws; but immediately when an act is done, the law judges not only of the act done, but of the intent with which it is done; and if accompanied with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable. That case is ably reported, and contains everything convincing which can be said on the subject."

COURT OF CRIMINAL APPEAL.

November 24, 1855.

THE JERVIS, C.J., PARKE, B., WIGHTMAN, CRESSWELL, and
WILLES, J.)

REG. v. ARMAN. (a)

Element—Receipt of money by virtue of employment—Question for the jury—Misdirection.

The trial of an indictment against a person employed as store-keeper and clerk under the governor of a county gaol for embezzlement, appeared that although it was no part of his regular duty to receive money, yet he was allowed by the justices to do so in the absence of the gaoler; and it was objected on his behalf that he had not received money by virtue of his employment, and that that was a question for the jury.

That it was a question for the jury; and the judge having directed the jury that if they believed that the prisoner received the money, he received it by virtue of his employment, the conviction was wrong.

At the Quarter Sessions for the Borough of Bedford, holden on the 29th day of June, 1855, before the Recorder, James Arman was indicted for embezzling the several sums of £16s. 9d. and 10s., the moneys of the justices of the county of Bedford.

The prisoner was employed in the service of the prosecutors Robert Evan Roberts, the governor of the county gaol, as keeper and clerk of the prison, and on his appointment written instructions, of which a copy is annexed, were delivered to him.

The prisoner was from time to time informed by the tradesmen of the sale of goods manufactured in the prison, and it was his duty to enter an account of these in the day-book, and to issue out bills of parcels and receipts for the purchasers.

The governor usually received the payments made by customers for goods; but sometimes in his absence the prisoner received the money, and when he did so the course of business was that he should, on the same day, enter the receipt thereof in the day-book, and should hand over to the governor the amount so received.

This was proved also by two of the prosecutors that they had themselves made payments to the prisoner for goods manufactured in the gaol, and that it was in their knowledge that he received the money from customers for goods so manufactured.

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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It was objected by the counsel for the prisoner that he had not received the moneys by virtue of his employment, and that it was a question for the jury to decide whether he had so received them or not. The Recorder told the jury that under these circumstances if they were satisfied that the prisoner had received the moneys, he was of opinion that he received them by virtue of his employment. The jury having found that he did so receive them, the Recorder told them that the only question then left was whether he embezzled them.

The jury found the prisoner guilty.

Whereupon judgment was postponed, and the prisoner was discharged on bail to appear at the next Epiphany Sessions for the borough.

The opinion of the judges is asked whether the Recorder ought not to have left it to the jury to say whether or not the prisoner had received the moneys by virtue of his employment.

INSTRUCTIONS TO STOREKEEPER AND CLERK.

To enter upon his duties at unlocking in the morning. To superintend the cleaning of the offices, and to consider himself responsible for everything therein. He is not to allow subordinate officers to interfere nor meddle with any of the books, nor must he permit them to congregate or gossip in the office.

Meals, &c.—He must go to breakfast at forty-five minutes past seven, return at thirty minutes past eight, A.M. Dinner at twelve, return at one, P.M., except on Tuesdays (V. J. Meetings), on those days, if the meetings are not over before one o'clock, his dinner must be brought to the prison.

Duties.—He will take his turn at the front gates in night duty, in common with the gate and assistant porter, except the week preceding and during the assizes and sessions, and at other times should the governor require his services. When not on night duty, his duties will cease at seven, P.M. When on night duty, the same time allowed him for tea as to the other officers. He will have a Sunday off duty in common with the other officers.

Office.—To check the daily state books daily. To take the utmost care of the commitments and other documents in the office. To endorse and deposit them in their proper place. To post the provision books and prison registers up every day. To collect the invoices for the weekly meeting on Tuesday. The requisition list to be prepared. The accounts from the various cash books to be prepared and laid before the governor for signature every Monday evening. The stock book to be regularly posted up.

Stores.—The storekeeper alone will be held responsible to the governor for the safe keeping and proper distribution of the stores in his charge, to enter all articles received and issued in the books supplied for that purpose, stating from whom received and to what department of the prison issued. He must also see that the articles supplied are according to sample; any departure therefrom he must at once communicate to the governor.

The general issue of stores for the ensuing week to be issued every Friday evening at four o'clock, and only those articles are to be issued which are applied for and entered in the requisition book, which the storekeeper will lay before the governor for his inspection.

Prisoners' names to be entered in "Register Description Book," "Sentence Book," and "Diary," if a fine, in "Fine Book;" also the commitments laid before governor every evening, endorsed with the usual particulars; every Friday make out list of discharge prisoners for the ensuing week. "Borough prisoners" to be entered in a "Borough Prisoners' Book." Punishment by governor to be entered every week for V. J. meeting.

Government Convicts.—Prepare weekly return of convicts every Saturday, also "monthly return" first of every month, to be forwarded to Director of Convict Prisons.

SESSIONS.

Manufactory.—The outstanding accounts to be made and sent out previous to every Quarter Sessions.

Bills.—Forms to be sent to parties supplying goods previous to each Session.

Sessions.—Black list for assize and sessions, calendars to be prepared for, &c., in the usual form.

Stationery.—Check off all articles supplied, as stated in the contracts for stationery.

13th Feb. 1854.

Taser, for prisoner.—The written instructions approved by the Secretary of State pursuant to 4 Geo. 4, c. 64, regulated the prisoner's duties; and he could not receive money by virtue of his employment. [JERVIS, C. J.—But he was, in fact, employed to receive money sometimes. That seems not to have been disputed. The objection was that, in point of law, he could not be so employed.] All that was admitted was the receipt of the money, and the chairman was requested to ask the jury, whether it was received by virtue of his employment; instead of which, he told them that, in point of law, it was so received.

Pearse, in support of the conviction.—The fair understanding of the chairman's direction is, that if they believed the evidence of the practice, that would justify them in finding that the money was received by virtue of the employment; and that, therefore, in substance the question was left to the jury.

JERVIS, C. J.—The case does not so state it. The chairman ought to have asked the question, whether the money was received by virtue of the employment; but it appears quite clearly that he did not.

PARKE, B.—He should have explained to the jury, that there might have been an employment by the justices, independently of the statutory regulations; and then asked them whether there was such an employment, and whether the money was received by virtue of it.

The other judges concurring, .

Conviction reversed.

REG.
v.
ARMAN.
1855.

Embezzlement
—Receipt by
virtue of
employment.

COURT OF CRIMINAL APPEAL.

November 24, 1855.

(Before JEEVIS, C. J., PARKE, B., WIGHTMAN, CRESSWELL, and WILLES, JJ.)

REG. v. STUBBS AND OTHERS. (a)

Evidence—Corroboration of accomplices.

The rule which requires the evidence of an accomplice to be corroborated is one of practice only, and although it is the practice of the judges to advise juries to disregard the evidence of such witnesses, so far as it implicates any prisoners against whom there is no other evidence, yet a different direction is not incorrect in point of law; and where a chairman of quarter sessions told the jury that corroboration of the accomplice as to two out of three persons charged was sufficient, though his evidence as to the third person should be viewed with more suspicion, a conviction of all three was affirmed.

AT the General Quarter Session of the peace for the county of Durham, held at Durham on the 2nd day of July, 1855, before Rowland Burdon, Esq., chairman, Francis Stubbs, Newton Wardle, William Waithman, and John Thornton, were indicted for stealing and receiving, knowing it to be stolen, a quantity of copper or yellow metal, the property of Edward Bailey.

The evidence, so far as it went to implicate Stubbs, was as follows:—Joseph Bailes, Joseph Robson, and John Robson, three accomplices in the robbery, swore to the copper having been taken from the possession of the prosecutor on the nights of Thursday, Friday, and Saturday, the 24th, 25th, and 26th days of May, in the year of our Lord, 1855.

They swore that Stubbs was present on the last of these takings only, and that he assisted in carrying the copper to a place of deposit in the Hendon Banks, on Sunderland Moor, near the town of Sunderland, and that he assisted in carrying some of it from the place aforesaid, and in selling it at one Storeys, a marine store dealer in Sunderland, and shared in the money that was produced by such sale. Storeys was called and swore that Wardle, Waithman and Joseph Robson were the parties who brought the copper

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

to his premises and sold it, and no further evidence was adduced as against Stubbs, but the accomplices were corroborated in other particulars in regard to the other prisoners.

At the conclusion of the case for the prosecution, the counsel for the prisoner Stubbs, after calling the attention of the chairman to several cases, asked him to direct the jury that the evidence of the accomplices in respect of the prisoner Stubbs was not corroborated, and that it ought to have been corroborated as to each prisoner individually; whereas it was only corroborated as to two of the four prisoners, Stubbs not being one of the two. After hearing the counsel for the prosecution, the chairman directed the jury that it was not necessary that the accomplices should be corroborated as to each individual prisoner being connected with the crime charged; that their being corroborated as to material facts, tending to show that Wardle and Waithman were connected with the robbery, was sufficient as to the whole case. But that the jury should look with more suspicion at the evidence in Stubbs' case, where there was no corroboration, than in the cases of Wardle and Waithman, where there was corroboration, but that it was a question for the jury. The jury found all the prisoners guilty. Stubbs was sentenced to twelve months imprisonment and hard labour.

The question for the Court of Criminal Appeal is, whether the direction of the chairman was right?

Gray, appeared for the prosecution, but no counsel for the prisoner.

JERVIS, C. J.—Although we may regret the result which has followed in this case from departing from the usual practice, we cannot interfere, for it is not a rule of law that an accomplice must be confirmed. In point of law the judge is bound to tell the jury that they may find a verdict of guilty upon the unconfirmed testimony of an accomplice; but the usual course is to advise them not to do so. The object of so advising the jury is, that they may thereby be assisted in getting at the truth; but if it were necessary that the accomplices should be corroborated in every particular, his evidence would be rendered entirely unnecessary. When the accomplice speaks to three persons as having been engaged in committing an offence, and is confirmed as to the identity of two only, it is my practice, and I think it is the proper course, to tell the jury that, though they may act as to all three on this evidence, yet they will do well not to act upon it as to the third man, with respect to whom there is no confirmation; because nothing is easier for the accomplice than to speak the truth as to two, and put the third man into his own place. The jury, however, may, if they choose to do so, give credit to the accomplice and act upon his evidence, though not confirmed; but they generally yield to the advice which the judge offers them. The usual and proper practice has not been followed in this case, but we cannot, on that account, hold the conviction bad in point of law.

PARKE, B.—My experience as a judge extends over more than
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a quarter of a century, and I have uniformly directed the jury in respect of the unsupported testimony of an accomplice, in the manner pointed out by the Lord Chief Justice. I have told the jury that they may act on such unsupported testimony, if they can bring their minds to place reliance on it, but I have advised them, and juries have generally acted on the advice, not to find a prisoner guilty, unless his testimony was corroborated, both as to the transaction itself, and also as to the identity of the person charged. The judges have not been quite agreed as to the degree of corroboration which ought to be required; but as an accomplice necessarily knows all the facts of the case, and upon the question of identity his evidence does not receive any confirmation from its consistency with those facts, I have always advised the jury to require confirmation as to that very point of identity; and I do not recollect any instance of their acting against that advice. The chairman has not followed the practice, but that is for the Secretary of State.

WIGHTMAN, J.—There has certainly been some diversity of practice upon this subject, as appears from the note (b) to 2 Starkie (Law of Evidence, tit. "Accomplice," p. 13), where *R. v. Jones* (2 Camp. 133), *R. v. Dauber* (3 Stark. 34), and other cases, are cited as instances in which it has been held, that where several are jointly tried, and there is confirmation only as to some, others may be convicted as to whom there is no confirmation. But the question is one for the jury. If they can conscientiously rely upon the testimony of an accomplice, though not confirmed, there is no rule of law which prohibits them from doing so; and confirmation can only mean some independent evidence supporting a part of the accomplice's statement, not the whole of it.

(b) The following observations are extracted from that note: "But then the question arises is any distinction to be made as to the nature of the circumstances, in respect of which confirmation is required—is it sufficient that the accomplice be confirmed simply as to the *corpus delicti*, or are some confirmatory circumstances essential as to the *identity of the offender*? The object of requiring confirmatory evidence must either be to create such a degree of confidence in the sincerity of the accomplice, as to render him *generally credible* even as to statements in respect of which he is not confirmed, or to exclude the probability of his attempting to deceive in the *particular transaction* which he details. If the latter be the true principle, some confirmation as to the agency of the accused should seem to be essential; for where there are no circumstances independently of the testimony of the accomplice to implicate the accused, the conviction must necessarily rest on the credibility of the witness. From the language of the judges on the subject, and particularly that of Thompson, C.J. (in the case of *R. v. Swallow*, York Trials, 1815, p. 16), it should seem that confirmation as to the circumstances of the offence, without any as to the *identity of the offender*, is sufficient; provided, of course, the jury be induced to give credit to such a witness. The same inference may, it seems, be drawn from those cases where it has been held, that where several are jointly tried, and there is confirmation only as to some, others may be convicted as to whom there is no confirmation. See *R. v. Jones*, 2 Camp. 133; and *R. v. Dauber*, 3 Stark. 34; and the point is stated to have been expressly decided in *Birbett's Case*, Russ. & Ry. 252. It must, however, be admitted, that even assuming that it is sufficient to confirm by circumstances the general credibility of the accomplice, yet that mere confirmation as to the circumstances of the offence, though it may show the accuracy of the accomplice's recollection, usually affords a very imperfect test of his *sincerity*. The ordinary motive to deceive, by which an accomplice would be influenced, is the hope of saving himself, and it may be a friend, who participated in the offence, by the conviction of an innocent person, and the temptation is to misrepresent not as to the circumstances of the offence, but merely as to the agents who committed it."

CRESSWELL, J.—I have always adopted in practice the rule mentioned by my brother Parke, and upon this ground, that an accomplice is a man who can have no difficulty as to the circumstances of the case, and whose knowledge of those circumstances therefore tends in no degree to show that his statement is correct as to the persons who committed the offence.

WILLES, J.—The statute 11 & 12 Vict. c. 78, provides that questions of law may be reserved for the consideration of this court. The question reserved in this case is one of practice only, and not one of law.

REG.
v.
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—
1855.

*Evidence of
accomplices—
Corroboration.*

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

November 24, 1855.

(Before JERVIS, C.J., PARKE, B., WIGHTMAN, CRESSWELL, and WILLES, JJ.)

REG. v. SMITH. (a)

Shooting with intent to murder—Mistake as to the person shot at.

If A. intending to murder B. shoots at and wounds C., supposing him to be B., he is guilty of wounding C. with intent to murder him; for he intends to kill the person at whom he shoots.

THE following case was reserved by Crompton, J:—

The prisoner was convicted before me at the Winchester Summer Assizes, 1855, on an indictment charging him with wounding William Taylor, with intent to murder him.

On the night in question the prisoner was posted as a sentry at Parkhurst, and the prosecutor, Taylor, was posted as a sentry at a neighbouring post.

The prisoner intended to murder one Malony, and supposing Taylor to be Malony shot at and wounded Taylor.

The jury found that the prisoner intended to murder Malony, not knowing that the party he shot at was Taylor, but supposing him to be Malony; and the jury found that he intended to murder the individual he shot at, supposing him to be Malony.

I directed sentence of death to be recorded, reserving the question whether the prisoner could be properly convicted, on

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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*Shooting at one
person in
mistake for
another—
Intent to kill.*

this state of facts, of wounding Taylor, with intent to murder him. See *Rex v. Holt*, (b) 7 C. & P. 518; see also *Reg. v. Ryan*, (c) 2 Moo. & Rob. 213.

The case was not argued by counsel on either side.

JERVIS, C. J.—The conviction is quite right, and must be affirmed.

PARKE, B.—The prisoner mistook the person; but there is no doubt that he intended to kill the man at whom he shot, and that was Taylor.

The other judges concurring,

Conviction affirmed.

(b) *Rex v. Holt*. Indictment for shooting at H. with intent to murder H. Evidence, that the prisoner intending to kill L. shot at H. mistaking him for L. Littledale, J., asked the jury whether the prisoner intended to kill H., telling them that the law inferred that a person intended to do that which was the immediate and necessary effect of his own act. The jury found that the prisoner did not intend to injure H., and the judge directed an acquittal.

(c) *Reg. v. Ryan*. Indictment for causing poison to be taken by A. B. with intent to murder A. B. Evidence, that the poison, though accidentally taken by A. B., was intended for C. D. Verdict—Guilty. Parke, B., afterwards said that he had spoken to Alderson, B., on the subject, and they both doubted whether the verdict could be supported, the averment of intention not being proved as laid. In *R. v. Lewis*, 6 Car. & P. 161, a conviction under similar circumstances had taken place, but he questioned the propriety of that decision; and under 1 Vict. c. 85, s. 2, it was sufficient to allege the act done “with intent to commit murder” generally. But as the intention was described with particularity “to murder A. B.” that intention, in his opinion, ought to be proved. He therefore directed a fresh indictment to be sent up laying the intent to “commit murder,” under which the prisoner was convicted and transported for life.

COURT OF CRIMINAL APPEAL.

November 24, 1855.

(Before JERVIS, C.J., PARKE, B., WIGHTMAN, CRESSWELL, and WILLES, JJ.)

REG. v. JARVIS. (a)

Possession of counterfeit coin—Evidence of guilty knowledge, and intention to utter.

The mere possession of a large quantity of pieces of counterfeit coin, of the same date and make, each being wrapped up in a separate piece of paper, affords evidence for the jury both of guilty knowledge, and of an intention to utter.

THIS case was reserved by Isaac Spooner, Esq., Deputy Recorder of the borough of Birmingham. The prisoner William Jarvis, was tried before me, the Deputy Recorder of the borough of Birmingham, at the General Quarter Sessions of the Peace, holden for the said borough on the 26th day of June, 1855, upon an indictment charging him with having in his possession on the 10th day of June, 1855, a number of pieces of false and counterfeit coin, to wit, thirteen pieces of false and counterfeit coin resembling and apparently intended to resemble and pass for thirteen pieces of the Queen's current silver coin called half-crowns; and fourteen pieces of false and counterfeit coin resembling and apparently intended to resemble and pass for fourteen pieces of the Queen's current silver coin called shillings, knowing the same to be false and counterfeit, and with intent to utter and put off the same. The prisoner was apprehended at twelve o'clock at night in a lodging-house at Birmingham by a policeman, who searched him and found upon him in different pockets of his dress, four counterfeit crowns, all electro-plated, of the same date and the same mould, each crown being wrapped in a separate piece of paper; thirteen counterfeit half-crowns, all electro-plated, of the same date, two of the same mould, each half-crown being wrapped in a separate piece of paper; and fourteen counterfeit shillings, all electro-plated, of the same date, and the same mould, each shilling being wrapped in a separate piece of paper; and four shillings good

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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money. On his apprehension, and at the police station, the prisoner said that they, meaning the counterfeit coin, had been given him while gambling, and he did not know they were counterfeit.

Upon these facts, it was contended for the prisoner, that on the true construction of the act of Parliament, the 2 Will. 4, c. 34, s. 8, under which the indictment was framed, there was no evidence to go to the jury that the prisoner knew the coin to be false or counterfeit, or that he intended to utter and put off the same. And a decision of Mr. Justice Maule at the Warwick Summer Assizes, 1854, on an indictment charging a like offence under the same statute against the same prisoner, was cited and relied on.

But on the facts proved before them, I told the jury that I thought there was evidence to go to them, that the prisoner had the coin in his possession knowing the same to be false and counterfeit, and with intent to utter and put off the same, but that they must be fully satisfied on these points before they could find the prisoner guilty.

The jury found the prisoner guilty of the misdemeanor, and I sentenced him to three years imprisonment in the gaol at Birmingham, as he was well known as a notorious utterer and putter off of false coin. I request the opinion of the judges whether the facts above stated justify the conviction of the prisoner in point of law.

The case was not argued by counsel on either side.

JERVIS, C. J.—I am of opinion that the conviction must be affirmed. We cannot be guided by a supposed decision of my brother Maule, which is not reported, and about which we really know nothing. Upon the facts stated in this case I have no doubt that there was evidence for the jury; and the question was properly left to them. The jury here found that the prisoner did know the coins to be false and intended to utter them; and I agree with them in that verdict. The prisoner is found in possession of four spurious crown pieces of the same date and mould; thirteen spurious half-crowns of the same date; and fourteen spurious shillings of the same date and mould, all wrapped in separate pieces of paper, to prevent them from rubbing against one another. How could he have them without knowing that they were false? and for what purpose could he have them but to utter them?

PARKE, B.—I am of the same opinion. If my brother Maule did decide as is suggested in the case, that decision cannot be sustained. It is contrary to several authorities, and especially *R. v. Fuller* (R. & Ry. 308), which are cited in 1 Russ., on Crimes, p. 48, where it is correctly stated that the having a large quantity of counterfeit coin in possession under suspicious circumstances, and unaccounted for, appears to have been considered as evidence of having procured it with intent to utter it as good. Here the suspicious circumstances were abundantly sufficient to warrant the jury in finding the prisoner guilty, and the conviction, therefore, must be affirmed.

CRESSWELL, J.—There is the additional circumstance that the spurious coins were found in different pockets of his dress, if anything more were necessary than the large quantity and the wrapping up of each piece.

WIGHTMAN, J., and WILLES, J., concurred.

Conviction affirmed.

REG.
v.
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—
1855.

*Possession of
counterfeit coin
—Evidence of
intent to utter.*

COURT OF CRIMINAL APPEAL.

January 19, 1856.

(Before POLLOCK, C.B., ALDERSON, B., COLERIDGE, WILLIAMS,
and WILLES, JJ.)

REG. v. AUSTEN AND ANOTHER. (a)

Evidence—Admissibility of deposition—Foreign witness absent abroad.

Upon a trial for felony it is no ground for receiving in evidence a deposition taken before the committing magistrate that the witness is a foreigner and absent in a foreign country.

THE following case was reserved by Mr. Bodkin.

Joseph Austen and John Turner were tried before me, acting as Assistant-Judge at a sessions for the County of Middlesex on the 14th day of August, 1855, for stealing various articles, the property of William Doodt.

The charge was fully established against them; they were found guilty, and sentenced to penal servitude for six years.

They were ordered to remain in prison, but the execution of the judgment was respite until the opinion of the Criminal Court of Appeal could be obtained upon the following facts:

William Doodt not being in attendance to prove that the stolen property was rightly stated to belong to him, it was proposed to read his deposition taken before the committing magistrate as evidence of that fact.

The deposition had been duly taken in the presence of the prisoners, who had the opportunity of cross-examination, and it was satisfactorily proved that William Doodt was not absent with any intention of defeating justice, but that being a foreigner, serving on board a foreign vessel at the time the property was stolen, he had, since the committal of the prisoners, returned to his own

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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witness absent
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country, and at the time of the trial was residing in a foreign kingdom. It was contended, that although this cause of absence was not within the provisions of the 11 & 12 Vict. c. 42, s. 17, the above facts made the deposition receivable independently of that statute, and considering it desirable to have the point settled, I received the evidence. I have now to submit to the Justices of either Bench and Barons of the Exchequer whether such reception was right.

This case was first argued on the 24th November, before Jervis, C.J., Parke, B., Wightman, J., Cresswell, J., and Willes, J., but the argument was not then concluded, and the case was now re-argued by the same counsel. The substance of both arguments is embodied in the following report.

Metcalf, for the prisoner.—The deposition was inadmissible; for there was no evidence that the witness was either dead or so ill as not to be able to travel; and those are the only cases in which the statute 11 & 12 Vict. c. 42, s. 17, provides for the admission of the deposition.

PARKE, B.—The statute mentions those two cases, but it does not necessarily exclude all others. (*b*)

Metcalf.—It is reasonable to suppose that the Legislature intended to exclude all others by mentioning only two. But even before the statute of 11 & 12 Vict. c. 42, the deposition would not have been receivable under the circumstances here stated. It is no more than a case of temporary absence, which might be a ground for postponing the trial, but is no ground for receiving the deposition in evidence.

CROMPTON, J.—It has been held that the deposition of a witness who had gone to sea since his examination could not be received.

Metcalf.—In *R. v. Hagan* (8 Car. & P. 167); where, however, it was received by consent. And in *R. v. Savage* (5 Car. & P. 143), where the prosecutrix was so near her confinement as to be unable to travel, her deposition was tendered in evidence; and 1 Hale, 586, and Kelyng, 55, were cited; but Patteson, J., said, "That has been doubted by Mr. Starkie (2 Stark. Evid. 276), and I think the evidence is not admissible." Therefore, neither at common law nor under the statute was the deposition in this case admissible, and the conviction must be reversed.

Caarten, for the prosecution.—This deposition was admissible upon the principles of the common law, and the statute 11 & 12 Vict. c. 42, s. 17, does not render inadmissible any deposition which was previously admissible. At common law it was laid down in an *Anonymous* case in Godbolt, 326, that the deposition of a witness in an English court, in a cause betwixt the same parties, may be read to the jury, "so as the party make oath that he did his

(*b*) See *R. v. Soaife*, 20 L. J. 229, M. C.; where it was held that since the statute, the deposition would be admissible if the witness was kept away by the procurement of the prisoner, but that it was not admissible merely on the ground that the witness after diligent search could not be found.

endeavour to find his witness, but that he could not see him nor hear of him;" and that is cited as law in 1 Stark. Evid. 265, and 1 Taylor on Evidence, s. 349; but Taylor adds, that "in criminal proceedings it would seem that a similar latitude is not allowable," referring to *Lord Morley's case* (Kel. 55; 6 How. Sta. Tri. 771.) However, the rules of evidence are the same in civil and in criminal cases. (Per Abbott, J., in *R. v. Watson*, 2 Stark. R. 155.)

POLLOCK, C.B.—The general rules are the same, but there are particular exceptions. The examination of a prisoner would not be admissible against him in a criminal case, unless, in the mode of taking it, the statutory requisites were complied with; but in a civil case it would.

Caarten.—The authorities, however, are not confined to civil cases, for even in criminal cases Lord Hale (1 Hale, 305; 2 Hale, 52) lays it down that the deposition may be given in evidence if the witness is prevented from attending by sickness, or is unable to travel. (He also referred to 1 Chitt. Cr. Law, 586.)

WILLIAMS, J.—But Mr. Greaves, in his edition of Russell on Crimes (vol. 2, p. 889), considers that not to be law, and refers to *R. v. Savage* (5 Car. & P. 143), and *R. v. Osborn* (7 Car. & P. 799), as well as to the observations of Mr. Starkie: (2 Stark. Evid. 276.)

Caarten.—The older authorities, however, certainly support the proposition; and in *Lord Altham v. The Earl of Anglesey* (Gilb. Eq. Cas. 16; Rep. temp. Holt, 736), it was held that where the witness resides in a place beyond the jurisdiction of the court his deposition may be read. It seems, therefore, that at common law the deposition was admissible in all these cases: the death of the witness, his permanent or even his temporary illness, his absence beyond the jurisdiction, and his being kept away by the procurement of the prisoner.

POLLOCK, C. B.—It would be contrary to the inveterate practice of many years growth to receive a deposition merely on the ground of the absence of the witness from any cause which might be merely temporary. If the witness is dead the case is clear.

ALDERSON, B.—Or kept away by the prisoner, or permanently insane.

WILLIAMS, J.—Or, as is said in Russell on Crimes, p. 889, "If there be a permanent inability to attend; as, if the witness be so ill that there is no probability that he will ever be able to attend."

Caarten.—If a witness is absent in a foreign country he is dead for all purposes of evidence, just as in Godbolt, 326, it is said, "If a party cannot find a witness, then he is, as it were, dead unto him."

ALDERSON, B.—Then if a witness is absent in Scotland or Ireland he is to be considered dead in law?

Caarten.—If an attesting witness was resident in Ireland his handwriting might be proved as if he were dead. (c)

(c) *Hodnett v. Forman*, 1 Stark. 90, per Lord Ellenborough; *Doe v. Caperton*, 9 Car. & P. 112, per Alderson, B.

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ALDERSON, B.—Is there any case in which inability to attend at the moment of the trial has been held sufficient to let in the deposition? In this case, for all that appears, the witness may be in Calais, and if any efforts had been made to obtain his attendance they might have been successful.

Caarten.—It is found that he was not absent with any intent to defeat justice.

ALDERSON, B.—That renders it more probable that his attendance might have been secured if proper exertions had been made. The only ground in this case is, that the witness was not subject to the process of subpœna; but that is not enough. In *Boyle v. Wiseman* (24 L. J. 160, Exch.) it was never suggested that that alone would be sufficient to let in secondary evidence.

Caarten.—In *R. v. Hagan* it certainly was done by consent, but if it had been considered contrary to any strict rule of law it would not have been permitted even with consent; and in *Buller's Nisi Prius*, 242, it is said, "If the witnesses examined on a coroner's inquest be dead or *beyond sea* their depositions may be read."

COLERIDGE, J.—In *R. v. Hagan* the judge ruled that without consent it could not be done, but that with consent it might; and there the prisoner was allowed to give in evidence the deposition of the witness because the Crown consented.

Caarten.—The question is one of considerable importance, as the ends of justice may often be defeated if under such circumstances a deposition cannot be read.

POLLOCK, C. B.—The more important the question the more insuperable is the objection which arises from the inveterate practice of not receiving depositions under such circumstances.

Caarten.—The principle upon which the admissibility of a deposition in any case rests is, that the party produces the best evidence of which the case is capable, and that principle applies to the present instance. Where the witness is out of the jurisdiction of the court, those who require his evidence are not responsible for his absence, and they may supply the evidence in the best way they can.

POLLOCK, C. B.—We are all of opinion that the deposition was inadmissible. The statute points out two cases in which the deposition may be received, and this is not either of them. It is impossible by any forced construction to bring this case within the statute. Independently of the statute, the reception of the deposition was contrary to the inveterate practice of the judges, and that practice confirmed by at least one decided case.

ALDERSON, B., concurred.

COLERIDGE, J.—I wish not to be understood as expressing an opinion, that the statute limits the admissibility of depositions to the two cases there mentioned. There may be several others in which, according to the old rule of the common law, the deposition may be receivable; but in this case the facts take the case out of the rule altogether. It is not even shown that the attendance of the witness might not easily have been obtained. On the contrary,

it is quite consistent with the statement in this case, that the witness may have been no further off than in Scotland, just on the other side of the border, within hail, and quite ready to come, if called.

WILLIAMS, J. concurred.

WILLES, J.—At common law, the practice of admitting depositions in the absence of the witnesses seems to have been very extensively exercised; and I think, therefore, that it is necessary to look for some broader ground than has been suggested for the decision of this case. The distinction appears to me to be this—between the cases in which the deposition is taken for the purpose of being used in evidence on the trial, if the witness is absent; and the cases in which it is taken in the course of a preliminary investigation, in order only to ascertain whether the case ought to be submitted to further judicial inquiry. In the former case much greater latitude is allowed than in the latter; but in the latter, the deposition is not receivable in evidence if there is any possibility of procuring the oral testimony. That reconciles all the cases. If the witness is dead or permanently disabled from attending it is admissible even at common law; but, in the present case, there are no facts which bring it within the rule of the common law or the words of the statute.

ALDERSON, B.—I must say, that, in my opinion, the rule as to the admissibility of depositions in lieu of the oral testimony of the witnesses ought to be carefully and rigidly limited; for the same rule which is laid down as to depositions taken by magistrates when the accused is present, and has the opportunity of cross-examination, will apply also to depositions taken by coroners in the absence of the accused. I doubt much whether the practice ought not to be strictly confined to the cases specified in the statute.

Conviction quashed.

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COURT OF CRIMINAL APPEAL.

January 26, 1856.(Before POLLOCK, C.B., MARTIN, B., COLERIDGE, CRESSWELL,
and WILLIAMS, JJ.)

REG. v. JOHN MOAH. (a)

*Embezzlement by receiver of taxes—Stat. 2 Will. 4, c. 4—Evidence—
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Upon the trial of an indictment under 2 Will. 4, c. 4, s. 1, charging that A., being entrusted by virtue of his employment in the public service with the receipt and custody of certain money, the property of the Crown, did fraudulently and feloniously apply the same to his own use, it was proved that A., being a receiver of taxes, had kept in his own hands a balance very much exceeding that which he was allowed to retain; and upon being asked whether he was prepared to pay over that balance or any part of it, he replied that he was not. He was then reminded that there was a balance of excise duties alone of about 300l. standing against him from the previous Monday, which was a receipt day at a particular place in his district. He then produced 255l., and said that was all he had in the world; and that the rest he had spent in an unfortunate speculation:

Held, that upon these facts there was evidence of the receipt of a particular sum of 300l. by virtue of his employment, and of a misapplication by him of a part of it; and that in this case, therefore, the conviction was right, even if evidence of a general deficiency on a balance of accounts would not alone have supported such an indictment.

Quære, whether evidence of a general deficiency on a balance of accounts is sufficient to sustain an ordinary indictment for embezzlement under 7 & 8 Geo. 4, c. 29, s. 47.

THE following case was reserved by Cresswell, J.:—

The prisoner was tried before me at the last Chester Gaol Delivery, on an indictment which contained two counts. The second, upon which alone he was found guilty, was as follows: "And the jurors aforesaid, upon their oath aforesaid, do further present that the said John Moah afterwards, and within six calendar months from the time of committing the said offence in the first count of this indictment mentioned, to wit, on the 13th day of

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

September, in the year aforesaid, being then employed in the public service of our Lady the Queen, and entrusted by virtue of such employment with the receipt and custody of money, the property of our Lady the Queen, did by virtue of his said employment, and whilst he was so employed as aforesaid, receive and have in his possession, and was entrusted with certain money, the property of our said Lady the Queen, to wit, to the amount of five thousand pounds, for and on account of the public service of our Lady the Queen, and the said money then fraudulently and feloniously did apply to his own use and benefit. And so the jurors aforesaid, upon their oath aforesaid, do say that the said John Moah, in manner and form aforesaid, the said last-mentioned money, being the property of our Lady the Queen, from our Lady the Queen feloniously did steal, take, and carry away against the form of the statute in such case made and provided, and against the peace of our Lady the Queen her Crown and dignity."

It was proved that the prisoner had for several years been an officer of receipt of inland revenue for the Chester district. In that capacity he received income tax, land, and assessed taxes, and duties of excise. On each of these accounts, he was allowed by the Board of Inland Revenue to retain in his hands a balance of one hundred pounds to meet contingent expenses. There were two inspectors of taxes for different portions of the prisoner's district, and it was his duty to send them returns showing the amounts received and remitted by him, and the balance remaining in his hands. According to the accounts so rendered by the prisoner in the months of July and August, 1855, the balance remaining in his hands under each head much exceeded what he was allowed to retain, and in the month of September the balance, in the whole, amounted to more than five thousand pounds. On the 13th of that month, the general surveyor of inland revenue came to Chester, and after examining the revenue accounts, had an interview with him, and produced to him a statement extracted from his own accounts, making the balance in his hands five thousand two hundred and fourteen pounds and a fraction. He said he knew the balance was about that sum, as he had gone through the accounts a few days before. The surveyor then asked him if he was prepared to hand over that balance or any part of it. He said he was not. The surveyor then reminded him that there was a balance of excise duties alone of about three hundred pounds standing against him from the previous Monday, which was a receipt day at Tarporley. The prisoner then took out two hundred and fifty-five pounds in Bank of England notes, a cheque for twenty-five pounds eight shillings and fourpence, and a money order of fourteen shillings, and said that was all the money he had in the world. The surveyor asked him what he had done with all the rest, he said he had spent it in an unfortunate speculation.

On behalf of the prisoner it was objected that, inasmuch as no evidence was given on behalf of the Crown of the receipt and misapplication of any particular sum, he could not be convicted under the 2 Will. 4, c. 4.

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I would not, on that ground, direct an acquittal, but left the case to the jury, who found the prisoner guilty of the offence alleged in the second count, and I have now to request the opinion of this court as to the sufficiency of the evidence to sustain the conviction.

The prisoner in the mean time remains in custody.

Ballantine (*Giffard* with him) for the prisoner.—The second count of this indictment is framed upon the words of the stat. 2 Will. 4, c. 4, s. 1 (*b*), which differ slightly from the words of stat. 7 & 8 Geo. 4, c. 29, s. 47, which is the general act against embezzlement; but the difference was introduced probably to meet the difficulty arising from the cases in which it had been held, that there must be a denial of the receipt of the money, or some false account, in order to constitute embezzlement. The present case, however, may be treated for the purpose of this argument as an ordinary case of embezzlement. Now, in all cases of embezzlement, the real offence charged is larceny, and the effect of the statute only is to get rid of the necessity of proving one of the ingredients essential to larceny at common law, viz. that the property had come into the hands of the master; with that exception, the servant must be shown to have stolen his master's money or goods in the same way as upon an indictment for larceny; and, indeed, the statutes and the indictment describe the offence as larceny. But larceny can only be committed in respect of something tangible, some chattel which is capable of being "taken and carried away." No man can steal that which is merely imaginary, a mental result from a certain combination of figures; and upon that ground the present conviction cannot be sustained. The evidence shows a general deficiency in the prisoner's accounts, that is to say, he has received, at various times, sums amounting to a certain aggregate sum; and he has duly accounted for part only of that aggregate sum. That result is arrived at by a calculation; but it is not represented by any tangible thing which can be the subject of larceny.

COLERIDGE, J.—You do not mean that the misapplication of any particular coin need be shown.

Ballantine.—I should contend that that was necessary, but for the special statutory provisions which have dispensed with that necessity: (7 & 8 Geo. 4, c. 29, s. 48; 2 Will. 4, c. 4, s. 3 (*c*), and 14 & 15 Vict. c. 100, s. 18.)

(*b*) 2 Will. 4, c. 4, s. 1: "If any person employed in the public service of His Majesty, and entrusted by virtue of such employment with the receipt, custody, management, or control, of any chattel, money, or valuable security, shall embezzle the same or any part thereof, or in any manner fraudulently apply or dispose of the same or any part thereof, to his own use or benefit, or for any purpose whatsoever, except for the public service, every such offender shall be deemed to have stolen the same, and shall in England and Ireland be deemed guilty of felony, and in Scotland of a high crime and offence; and on being thereof convicted in due form of law, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned," &c.

(*c*) Sect. 3: "That it shall be lawful to charge in the indictment to be preferred against any offender under this act, and to proceed against him for any number of distinct acts of embezzlement or fraudulent application or disposition as aforesaid, not exceeding three, which

COLERIDGE, J.—Then it is found in this case that the surveyor reminded him that there was a balance of excise duties alone of about 300*l.* standing against him from the previous Monday, which was a receipt day at Tarporley. Then the prisoner produced 255*l.*, and said that was all he had in the world. Does not that show that at all events some part of a sum of 300*l.*, received on a given day, had been misapplied by him?

Ballantine.—The balance of 300*l.* would consist of numerous items received from different people; and the prisoner was always entitled to retain 100*l.* to meet contingent expenses. It is therefore impossible, upon this evidence, to point out any particular sum of money received by the prisoner and embezzled.

POLLOCK, C. B.—You say, then, that if a servant is entitled to keep in hand 1*l.* out of 20*l.* which he receives for his master, he may steal the whole with impunity.

Ballantine.—Not if the transaction can be traced; but where the only evidence is a general deficiency in the accounts, it is impossible to point to any particular transaction of receipt and misapplication. If evidence of a general deficiency were held to be sufficient, the prisoner would be indirectly deprived of certain rights which the law gives him. In the first place, he would have great difficulty in making out a plea of *autrefois convict* or *acquit*. Suppose a man to be indicted for embezzling a larger sum of money, and to be convicted upon evidence of a general deficiency to that amount; and to be afterwards indicted for embezzling several particular sums of smaller amount, what means would he have of identifying those sums with any portion of the amount, which was the subject of the former charge?

POLLOCK, C. B.—He would plead, generally, that he had been before convicted of the same offence; and upon the trial, I do not see that there would be any difficulty in showing that it was the same offence; because the general balance upon the whole account must necessarily include all the particular items.

Ballantine.—Suppose the second indictment alleged the embezzlement of a particular cheque, how could he show that he had been before convicted of embezzling that? It may be that everything is included in the general balance; but then the indictment is not for embezzling a general balance, but for embezzling certain sums of money received by virtue of the employment. The evidence of a general deficiency is used to

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may have been committed by him within the space of six calendar months from the first to the last of such acts; and in every such indictment, where the offence shall relate to any money or any valuable security, it shall be sufficient to allege the embezzlement or fraudulent application or disposition to be of money, without specifying any particular coin or valuable security; and such allegation, so far as it regards the disposition of the property, shall be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security, of which such amount was composed, shall not be proved, or if he shall be proved to have embezzled any piece of coin or any valuable security or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof, should be returned to the party delivering the same, and although such part shall have been returned accordingly."

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support the allegation of embezzling particular sums; and there can be no conviction, unless the prisoner is found guilty of embezzling some particular portions of the general balance. That being so, it would in very many cases be impossible to prove that the prisoner had already been convicted of embezzling the very same sums.

POLLOCK, C. B.—This is a statutory offence; and the statute says, that if a person does certain things he shall be deemed to have stolen. That may not be a convenient method of legislation; but the question here is whether the prisoner has done those things. And has he not, if there is a general deficiency in his accounts?

COLERIDGE, J.—Sect. 3 of 2 Will. 4, c. 4, provides that the form of indictment may be general, alleging merely the fraudulent application of money, and that it shall be supported by proof that the offender has embezzled any amount, although the particular species of coin, or valuable security, of which that amount was composed, should not be proved, or by proof of his having embezzled any coin or security, or “any portion of the value thereof,” although a portion of the value should have been returnable, and returned to the party from whom the coin or security was received.

WILLIAMS, J.—Does not that mean that if he received 5*s.*, and had to return one to the customer; and then embezzled the 4*s.*, or any part of it, he should be guilty?

Ballantine.—It has no further operation than that. But there is another difficulty in the way of this conviction, which is this, that the general deficiency may represent any indefinite number of distinct embezzlements; and the law will not permit a man to be put upon his trial for a vast number of different offences at the same time.

POLLOCK, C. B.—I am not aware that there is any rule of law against it; but it is no doubt the practice of the judges not to permit a prisoner to be embarrassed in his defence by a multiplicity of charges, and in such cases to require the prosecution to elect.

Ballantine.—And that practice has so far been recognised and acted upon by the Legislature, that special provision has been made for including in one indictment “any number of distinct acts of embezzlement, *not exceeding three*, which may have been committed by him against the same master within the space of six calendar months from the first to the last of such acts.” (7 & 8 Geo. 4, c. 29, s. 48.) There is a similar provision in s. 3 of 2 Will. 4, c. 4; and now as to larceny also in 14 & 15 Vict. c. 100, s. 16. But notwithstanding these provisions, if a charge of embezzlement may be proved by evidence merely of a general deficiency, it is impossible to say how many distinct acts of embezzlement may be involved in the charge.

WILLIAMS, J.—That assumes that the receipt of the sum is the offence.

Ballantine.—Not that the receipt is the offence, but that the receipt of a particular sum and the misappropriation of that sum constitute the offence.

JUDGE, J.—Suppose, then, that the prisoner receives various money from many different persons, and puts them altogether in a bag, without any means of afterwards distinguishing one from another, or saying that if he takes out less than the whole, he cannot be convicted?

J.—Yes. It would, in that case, be impossible to say what particular sum or sums received by virtue of his employment were embezzled.

WELL, J.—But suppose he had received various sums from people amounting to five thousand pounds, and he paid them into his banker's, together with five thousand pounds of money, and afterwards drew out the whole by one cheque, and used it to his own use.

J.—There would be evidence for the jury in that case of receipt and embezzlement of a particular sum.

WELL, J.—How is that different from this case, where the prisoner says, I know that the balance is about five thousand pounds, and I have misappropriated it?

J.—The difference is, that, in this case, the total receipts are larger than the amount of defalcation, and there is no evidence applicable to any particular sum. The authorities upon this are few and not satisfactory. It has been supposed that *R. v. Moo. C. C. 447* is an authority for the position that an inference for embezzlement may be supported by proof of a general receipt of moneys that ought to be forthcoming, without showing any particular sum received and not accounted for; but there was a difference of opinion amongst the judges upon that case, and the decision was ultimately affirmed by a majority of one only. It was also decided that it was not upon the general principle, but upon special facts of the particular case. Mr. Justice Allan, in sentencing the prisoner, said, that the judges were of opinion that there was evidence for the jury of his having received moneys on a particular day: (7 Car. & P. 635.) [CRESSWELL.—The case reserved, however, expressly states that particular moneys could not be ascertained.] At all events, *R. v. Grove* has been generally acted upon since.

WELL, J.—In *R. v. Lambert* (2 Cox Crim. Cas. 309), it was held upon by my brother Erle.

J.—In *R. v. Lloyd Jones* (8 Car. & P. 288), Alderson, B. held that it was not sufficient to prove a general deficiency, and he was of opinion that the decision in *R. v. Grove* turned upon the special facts of that case. Again, in *R. v. Chapman* (1 Car. & K. Williams, J. laid down the same rule. There a clerk, whose duty it was to receive moneys, make payments, and pay over balances, entered in his book a sum of thirty-five pounds as paid, when, in fact, he had only paid twenty-five pounds, so that the balance which he carried over to his master was ten pounds less than it ought to have been. But the learned judge asked the counsel for the prisoner whether he could show “any precise sum received by the prisoner on account of his master, and the whole or part of that sum.”

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very sum appropriated by him to his own uses;" and upon being told that there was no evidence of that kind, he added; "in the absence of such evidence, I think that the prosecution cannot be sustained;" and he directed an acquittal. Yet, that learned judge tried *Grove*, and was one of the majority who afterwards affirmed the conviction. Upon principle, therefore, and authority it is submitted that an indictment for embezzlement cannot be sustained without proof of the receipt of some particular sum of money, and of the misappropriation of that sum or of some part of it, and if that be so in the ordinary case of embezzlement it is equally so in the case of an indictment founded upon the statute 2 Will. 4, c. 4, s. 1. [CRESSWELL, J.—The words of that statute are more comprehensive than those of 7 & 8 Geo. 4, c. 29, s. 47. It is not easy to avoid the effect of the words, that if any person having "the management or control of any money" shall "in any manner fraudulently apply or dispose of the same or any part thereof to his own use," he shall be deemed to have stolen the same. Suppose that moneys are to be paid into the account of a receiver for a particular district, and are so paid in. Then he has the control and management of that money, but if he draws a cheque and pays it away for his own use, would it be necessary, upon an indictment under this statute, to show who paid it in?

Ballantine.—Probably not, but then it must be shown in point of fact, that he had in his control, at some one time, a particular amount which he is charged with embezzling.

CRESSWELL, J.—That is proved in this case by the prisoner's own admission; which left no doubt that on the Tarporley receipt day he got into his hands a lump sum of three hundred pounds.

Ballantine.—That was made up of receipts from various people, and cannot be distinguished from the other moneys which he had to account for. It forms part of the general deficiency, with regard to all of which the prisoner says that he had lost it in an unfortunate speculation.

Welsby (*Davison* with him), for the prosecution.—The statute 2 Will. 4, c. 4, provides, that if certain things concur, the person, with respect to whom they concur, shall be deemed to have committed larceny. First, he must be employed in the public service of Her Majesty, and the prisoner was so employed. Secondly, he must have been entrusted, by virtue of such employment, with the receipt, custody, management, or control of some chattel, money, or valuable security, and the prisoner was so entrusted. Lastly, he must fraudulently apply or dispose of the same or some part thereof to his own use or to some other purpose than the public service; and the jury have found that he did fraudulently apply to his own use a sum of five thousand pounds or part thereof. The only question now is, whether there was any evidence to support that finding. Now, as to the Tarporley collection, at least, the case seems quite free from doubt by the prisoner's own admission.

(He was stopped.)

POLLOCK, C. B.—I believe we are all of opinion that whatever

difficulty might exist as to the general question which has been argued, there is no difficulty in saying that the evidence with respect to the sum of 300*l.* clearly brings the case within the statute. The case finds that, after some conversation about the amount of the general balance against the prisoner, "the surveyor then reminded him that there was a balance of excise duties alone of about 300*l.* standing against him from the previous Monday, which was a receipt day at Tarporley. The prisoner then took out 255*l.* in Bank of England notes, a cheque for 25*l.* 8*s.* 4*d.*, and a money order for 14*s.*, and said that was all the money he had in the world. The surveyor asked him what he had done with all the rest. He said he had spent it in an unfortunate speculation;" which amounts to this, that he had received a certain sum on account of the Crown and spent it in an unfortunate speculation. That evidence, I think, brings the case within the statute, which was passed for the purpose of affording the utmost facilities for punishing persons guilty of fraudulently appropriating money belonging to the Crown, but entrusted to them by virtue of their employment. (The learned judge read the words of the section.) Now it appears to me that a great part of the learned and elaborate argument which we have heard upon the general question does not apply to this case; because, according to the language of the particular statute upon which this indictment is framed, whenever any public servant embezzles "or fraudulently misapplies" money of the Crown, with the control of which he is entrusted, he is to be deemed guilty of larceny; that is, he may be indicted simply for larceny, and upon that indictment the facts may be proved which are necessary to bring him within the operation of the statute. We must give effect to the plain meaning of the enactment, although, for my own part, I cannot say that I approve particularly of that mode of legislation whereby it is provided that one thing shall be called by the name of another; and giving effect to the enactment we must see whether the facts proved make out the substance of the charge, which consists in the abuse of the public trust and the misappropriation of the public money. If they do, then the form of the indictment is given by the statute, in order to get rid, probably, of the difficulty which might sometimes be experienced in stating the particular mode of receiving the money. Now here the evidence is, even according to the prisoner's own statement, that on a particular occasion he received 300*l.* of the public money, and that some part of that he applied to a speculation of his own. That being so, I think the offence created by the statute is completely made out, and that the conviction must be affirmed.

COLERIDGE, J.—I am of the same opinion. It is not necessary in this case to go into the general question, but I desire not to be considered as assenting to much that Mr. Ballantine has urged in the course of his argument upon that subject. The count, upon which the prisoner has been convicted, after stating what the statute requires as to his employment in the public service, and his

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being entrusted with the public money, alleges that he fraudulently and feloniously did apply the same to his own use; and then draws the conclusion which the statute warrants, that he thereby stole the money. Now the evidence is, that, a few days before he is called to account, he had received, no matter from how many different people, various sums amounting to three hundred pounds at least. Those sums formed a fund in his hands belonging to the Crown; and that fund being in his hands, the question is, whether he has fraudulently applied it or any part of it to his own use. Now he produces two hundred and fifty-five pounds, and it is not material whether that sum of two hundred and fifty-five pounds was part of the three hundred pounds or not; because, according to his own statement, the rest, which must include part or all of the three hundred pounds, he had spent in an unfortunate speculation. It appears to me to be just the same as if he had received three hundred pounds in a bag, and taken out some part of it for his own use, and if that is not a receipt of a particular sum, by virtue of his employment, and a fraudulent appropriation of some part of that sum, it is difficult to say what would be. Therefore this part of the evidence alone is sufficient, in my opinion, to support the conviction.

CRESSWELL, J.—I am of the same opinion. I think that the indictment is clearly sustained by the evidence as to the sum of three hundred pounds, but I do not mean to say that it might not also be sustained by the evidence as to the five thousand pounds. It is not necessary, however, to decide the latter point; and upon that there are some authorities which it seems difficult to reconcile. In *R. v. Grove*, under somewhat similar circumstances, a conviction was sustained by a majority of eight judges to seven; but in a subsequent case, that decision was not followed, and was said to have proceeded upon some special facts. *R. v. Lambert*, however, cannot be distinguished from this case, and there my brother Erle held, that evidence of a general deficiency was sufficient to sustain an indictment for embezzlement. As at present advised, I should say that if the prisoner is shown, by his own accounts, to have a balance in hand of five thousand pounds due to the Crown, and he makes no attempt to explain it on the ground of mistake or loss of the money, but merely says that he has spent it for his own purposes, he may upon that evidence be convicted of embezzling the money; and that having been once indicted for embezzling the whole amount, and either convicted or acquitted, he never could be indicted again for embezzling any part of it. I merely throw this out, however, as showing my grounds for saying that I am by no means satisfied that this indictment might not have been sustained as to the whole amount of the prisoner's deficiency.

WILLIAMS, J.—I was anxious to have decided the general question, but there are circumstances in this case which make it our duty to decide it on a narrower ground, and it is unnecessary, therefore, to overrule or qualify any former decisions. Here it appears that the prisoner was entrusted with the receipt and custody

two hundred pounds on behalf of the Crown, and that he fraudulently applied part of it to his own use. There is a specific indictment pointed at, as to which the case is free from all objection. MARTIN, B.—This is an indictment framed upon section 1 of the Act of 1856, c. 4, and the true mode of ascertaining whether the offence in question has been committed, is to look at the language of the statute, and see whether the facts proved bring the case within that language. If there have been decisions of the courts upon the statute, we are bound by those decisions; but I protest against the idea that a number of cases decided years before upon a former statute, can be any guide to us in interpreting the particular statute before us. Now what are the words of this statute? (His Lordship read the section.) Was this person employed in the service of the Queen? He was. Was he, by virtue of that employment, entrusted with the receipt, custody, or control of money? There is no question that he had the whole of the money. Then did he fraudulently apply it or any part of it to his own use? There is his own statement, that, excepting two hundred and fifty-five pounds, he had spent it in an unfortunate speculation. The case is clearly within the statute, and if there is anything in the authorities, which were decided before the statute passed, inconsistent with that conclusion, then I should say that the statute was passed to get rid of those cases. The Legislature has declared what the law shall be, and we must give effect to that declaration. The authorities, as it appears to me, throw no great light upon it; but the indictment itself strictly applies to the facts of the present case.

Conviction affirmed.

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COURT OF CRIMINAL APPEAL.

January 26, 1856.

(Before POLLOCK, C.B., MARTIN, B., COLERIDGE, CRESSWELL,
and WILLIAMS, JJ.)

REG. v. JAMES JESSUP. (a)

False pretences—False answers given by a recruit on enlistment into the militia—Mutiny Act.

In answer to questions contained in the form of attestations for militia volunteers issued by the War Office, a recruit answered that he did not belong to nor had been enrolled in any other corps of militia, and that he did not belong to nor had served in Her Majesty's army; whereas, in truth, he had previously been enrolled in another corps of militia:

Held, that he could not be convicted upon an indictment framed under sect. 57 of the Mutiny Act (18 & 19 Vict. c. 11), as the forms in the schedule to that act contained no such question as had been put to the prisoner respecting his previous enrolment in the militia; and as his negative answer to the question whether he had served in the army, could not be considered wilfully false.

THE following case was reserved by the Recorder of Canterbury:—

The prisoner was tried and convicted before me at the Quarter Sessions for the city of Canterbury, holden on the 31st day of December, 1855, upon an indictment for misdemeanor which contained three counts. The first count was framed upon that portion of the 57th section of the Mutiny Act, 18 & 19 Vict. c. 11, which provides that any recruit who shall designedly make any false representation of any particular contained in the oaths and certificates in the schedule to this act annexed, before the justice at the time of his attestation, and shall obtain any enlisting money or bounty for entering into Her Majesty's service, shall be deemed guilty of obtaining money under false pretences within the true intent and meaning of the 7 & 8 Geo. 4, c. 29. The second count was framed on the statute 7 & 8 Geo. 4, c. 29, and charged in substance that James Jessup being a recruit, and before

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

being attested to serve in the Kent Artillery Militia unlawfully, knowingly, and designedly did falsely pretend to James O'Niell that he Jessup had not been enrolled in any other corps of militia, by means of which false pretence he obtained from O'Niell the sum of 10s., the property of O'Niell, with intent to defraud, whereas Jessup had, prior to the making of the said false pretence, been enrolled in the West Kent Militia. The third count was similar to the second, except in stating the false pretence to have been made to John Henry Hay Ruxton. Upon the part of the prosecution a printed form supplied by the War Office, and headed "Attestations for Militia Volunteers," was proved and read. It contained several questions, all of which were asked of the prisoner at the time of his enlistment, with his answers; a copy of the form is annexed to the case with the answers of the prisoner to the questions numbered 14 and 15, which questions and answers alone were material. Question 14 is, "Do you belong to, or have you been enrolled in, or rejected by any other corps of militia; or do you belong to Her Majesty's army, or the marines, ordnance, or navy; or to the forces of the East India Company?" Answer, "No." Question 15 is, "Have you ever served in or been rejected by the army, marines, ordnance, or navy, or the forces of the East India Company; or are you in receipt of a pension for any such service?" (b) Answer, "No." The prisoner, upon the 2nd November, 1855, when brought before the Deputy-Lieutenant to be attested as a recruit for the Kent Artillery Militia gave those answers, and affixed his signature to the form in the presence of Serjeant James O'Niell who was the recruiting serjeant, and who paid to the prisoner 10s. as enlisting money, believing his answers to questions 14 and 15 to be true. At the time of the prisoner's enlistment, the Kent Artillery Militia was assembled for the purpose of being trained and exercised. The form was duly signed and completed in all respects by the proper parties to it, and the particulars disclosed upon the face of it were filled in. To prove the falsehood of the prisoner's representation it was shown that prior to the month of May, 1853, he had been enrolled in and served as a private in the West Kent Militia, and was discharged from that regiment in that month.

The jury found the prisoner guilty, and I ordered him to be imprisoned for three calendar months, and to be kept to hard labour, but I respite the execution of the judgment. The prisoner remains in prison. He was undefended. Upon reference to the questions to be put to a recruit on enlisting, set out in the schedule to the Mutiny Act, 11 & 12 Vict. c. 11, which appear to be contained, though not printed in each subsequent Mutiny Act,

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(a) At the foot of the page in the printed form there was the following note in reference to question 15: "If the volunteer has served as above, he is to state the particulars of his former service, and the cause of his discharge and is to produce the certificate of his discharge if he has it with him. If in receipt of pension he must produce an authority for enlisting from the staff officer of pensioners by whom he is paid."

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including the act 18 & 19 Vict. c. 11, there are no questions similar to those numbered 14 and 15 in the form used from the War Office on an enlistment. I was informed that false answers to questions numbered 14 and 15 in the War Office form were frequently given by persons who had served in the militia, and entertaining doubts whether in question 14 in the schedule to the act 11 & 12 Vict. c. 11, the militia are included in the term "army," I humbly ask the opinion of the Justices of either Bench, and of the Barons of the Exchequer—

First. Whether the prisoner having obtained enlisting money by stating that he had not been enrolled in any corps of militia, and had not ever served in the army, when in truth he had been enrolled and served in a militia regiment, committed an offence within the provisions of section 57 of the Mutiny Act, 18 & 19 Vict. c. 11?

Second. If he did not commit an offence within the Mutiny Act, whether he was rightfully convicted upon either the second or third counts of the indictment?

No counsel appeared for the prisoner.

F. Russell for the Crown.—The question upon the first count is, whether the prisoner has committed an offence within sect. 57 of the Mutiny Act, which, amongst other things, provides that any recruit, who shall designedly make any false representation of any particular contained in the oaths and certificates in the schedule to this act annexed, before the justice at the time of his attestation, and shall obtain any enlisting money or bounty for entering into Her Majesty's service, or any other money, shall be deemed guilty of obtaining money under false pretences, within the meaning of 7 & 8 Geo. 4, c. 29. Now questions 14 and 15 in the form of attestation for militia volunteers are not to be found in the schedule to the Mutiny Act; but there is this question, "Have you ever served in the army?" and a man who has been enrolled in the militia cannot truly say that he has not served in the army. A militia man has recently been held to be a soldier: (*Overseers of Horton v. Overseers of Leeds*, 25 L. J. 38, M. C.) [*COLERIDGE, J.*—That was upon the construction of the statute attaching irremovability to a five years' residence. *WILLIAMS, J.*—Besides, if in legal strictness service in the militia was service in the army, is it likely that the man would know that? And in question 14 a distinction is made between the militia and the army. *COLERIDGE, J.*—What authority is there for putting questions different from those in the schedule?] By the Militia Act (15 & 16 Vict. c. 50, s. 16), the Secretary-at-War has power to make regulations respecting the attestation of militia men; and the form produced at the trial was proved to have come from the War Office. There is another point in the prisoner's favour that the questions were put to him by a Deputy-Lieutenant and not by a magistrate.

POLLOCK, C. B.—It is quite clear that the conviction cannot be sustained.

Russell.—It may on the second and third counts.

MARTIN, B.—We are asked whether he was rightfully convicted upon those counts? I, for one, cannot say whether he was or was not.

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Russell.—The case means—assuming the facts to have been proved as stated, and the case to have been properly left to the jury—is there evidence sufficient to justify a conviction, and it is submitted that there is. *False pretences*
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COLERIDGE, J.—We cannot say that he obtained the money by means of the false pretence.

POLLOCK, C.B.—We are really not in a condition to discuss the question as to the second count.

CRESSWELL, J.—It is enough to say, that upon the case there does not appear sufficient to sustain the conviction on the other counts.

Conviction quashed.

COURT OF QUEEN'S BENCH.

SITTINGS AFTER TERM AT WESTMINSTER.

December 6 and 7, 1855.

(Before ERLE, J.)

REG. v. COYLE. (a)

Perjury—Evidence of question put by counsel on former trial—Presumption against prisoner from conduct of counsel at former trial between the same parties.

On the second trial of an indictment for perjury, fresh witnesses for the defence were called to prove facts confirming the prisoner's alleged false statement. A witness called by the prosecutor to contradict a fact deposed to by them was allowed to prove that on the former trial a particular question was put to him, on his cross-examination by the prisoner's counsel, in order to show that at that time the prisoner's counsel had notice of the testimony now given, but did not venture to call the witnesses.

THE defendant had been indicted for perjury committed upon the trial of J. H. Alleyne and others, for a conspiracy to defraud one Kennedy, by false pretence. The indictment charged that the defendant swore falsely and corruptly that he was present in a private room in the Plough Hotel, Cheltenham, with Holder Alleyne and A. M. Alleyne, on the 29th of November, 1846; and that at this meeting it was arranged that certain representations should be made to Kennedy, with a view to defraud him. At the trial A. M. Alleyne proved that at the time in question he was at Bath. The defendant was convicted and sentenced to two years' imprisonment. He underwent a portion of his punishment. A rule for a new trial was subsequently obtained, on the motion of Edwin James, Q.C., and afterwards made absolute, upon the representation that a Mr. Price Lewis and one Captain Price had seen the parties together at the time sworn to by Coyle in the coffee-room of the Plough Hotel in Cheltenham.

The *Attorney-General*, *S. Temple*, Q.C., and *Huddleston*, for the prosecution.

Edwin James, Q.C., and *Hawkins*, for the defence.

(a) Reported by J. PAXTON NORMAN, Esq., Barrister at-Law.

On the second trial, Mr. Price Lewis and Captain Price, after the case for the prosecution had closed, having been called for the defence, gave evidence to prove that the prisoner Coyle, Holder Alleyne, and A. M. Alleyne were together in the coffee-room of the Plough Hotel, Cheltenham, at the end of November, 1846, and that Captain Price had then cautioned A. M. Alleyne against Coyle.

A. M. Alleyne having been recalled to contradict this testimony, stated that he had a vague recollection of having received some such caution, but that the events alluded to must have taken place in 1848 or 1849, and not in 1846, as was sworn to by the said witnesses.

S. Temple now proposed to put the following question to the witness A. M. Alleyne, "On the last trial of this indictment were you not asked, on cross-examination by Mr. James for the defendant, if you had not said that you had seen Coyle in a coffee-room in Cheltenham in 1848 or 1849?"

Edwin James, Q.C., objected, that, though in cross-examination you may ask a witness whether he has not given a different account of the facts, in order to discredit him, a witness cannot be asked for the purpose of supporting or confirming his testimony, whether at another time he had given the same account of the transactions as he then gave.

ERLE, J.—The point is to prevent the observation that the witness has now invented the story.

Cockburn (Attorney-General).—It is proposed to ask this question in order to show that on the former trial the counsel for the defence had notice of the facts now adduced in evidence; that the defence was present to the minds of the counsel on the former trial, but they did not dare to call Price Lewis. It is proposed to put the question in this way with the purpose of so far negating the case for the defence.

Edwin James.—Can you ask a witness what he said in his depositions, or put the depositions in to confirm him?

ERLE, J.—You may put the question in this form: ask the witness, "At the former trial were you not asked whether you had seen Coyle in the Plough coffee-room in 1848 or 1849?" The answer must be simply yes or no.

The *Attorney-General*, in his reply, used this evidence thus. He said—"I asked A. M. Alleyne whether on the former trial he was not cross-examined as to this meeting in the Plough coffee-room at Cheltenham. If he did not tell the same story, then Mr. James would have elicited that from him, or if Alleyne denied it then he might have proved it. I am entitled to take it that the witness made the same statement on the first trial. The counsel on the other side had notice of the case now sought to be set up, but did not choose to bring it forward and prove it on the former trial.

[Refer to *College v. Horn*, 3 Bing. 119; Taylor on Evidence, 620, 644; *Simpson v. Robinson*, 12 Q. B. 512.]

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COURT OF QUEEN'S BENCH.

January 29, 1856.

REG. v. JUSTICES OF LANCASHIRE.

Highway—Out of repair—Turnpike.

Where a turnpike road is out of repair, the justices have no jurisdiction to summon the highway surveyor under 5 & 6 Will. 4, c. 50, s. 94, in the first instance, but the turnpike surveyor should be summoned under proviso in sect. 94, and then if he makes it appear that the turnpike trustees have not requisite funds, the highway surveyor may be proceeded against.

RULE *NISI* for a *mandamus* to two justices to require them to proceed to hear and dispose of a summons against the surveyor of the highways under 5 & 6 Will. 4, c. 50, s. 94.

The summons alleged that a certain turnpike-road or highway called the Manchester, Hyde and Mottram-road, in Longdendale turnpike-road, within the township of Gorton, and with the repairs of which the said township was chargeable, is out of repair, and that the surveyor of the highways of the said township had been required to repair, but had neglected to do so.

The summons was granted by one justice only, and came on for hearing before two justices, when it was objected that the road in question being a turnpike-road, the justice had no jurisdiction under the Highway Act, 5 & 6 Will. 4, c. 50, s. 113. The justices thereupon offered to issue a summons against the surveyor of the turnpike-road under the proviso in sect. 94; but this the complainant refused, and then obtained this rule.

H. Hill showed cause.—Sect. 113 enacts that the act shall not apply to any turnpike-road except where specially mentioned; and here it appeared, both on the face of the summons and by the evidence before the justices, that this was a turnpike-road. Then sect. 94, in the positive enacting part, makes no mention of turnpike-roads; and in the proviso enacts that "if the said highway so out of repair is part of the turnpike-road, the justices shall summon the treasurer or surveyor, or other officer of such turnpike-road; and the order herein directed shall be made upon him, and the money therein stated shall be recoverable as aforesaid." Therefore the turnpike surveyor, and not the surveyor of the highways, was the proper party to be summoned in this case; and this

appears more clearly from the previous part of sect. 94: "If any highway is out of repair, and information is given to any justice, he may issue a summons requiring the surveyor of the parish, or other person or body politic or corporate, chargeable with such repairs to appear at a special sessions for the highways; and the justices shall either appoint a person to view the highway and report hereon at the special sessions, or themselves view. And at the special sessions, if it shall either appear from the report, or on the view of the justices, that the highway is not in a thorough state of repair, the justices shall convict the surveyor or other party liable to the repair in a penalty not exceeding 5*l.*, and make an order for the repairing of the same, and in default of repairing according to the order, a second penalty is imposed equal to the sum necessary to repair the highway." So that the justices could not proceed against the surveyors of the highways under sect. 94 without convicting him in a penalty for not doing what he has no power to do, this being a turnpike-road. To get a *locus standi* against the highway surveyor when a turnpike-road is out of repair, it must be proved that the trustees of the turnpike-road had no funds. Cases cited: *George v. Chambers*, 11 M. & W. 149; *R. v. South Shields Turnpike Roads*, 23 L. J. 134, M. C.; *R. v. St. Albans*, 22 L. J. 142, M. C.

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Welsby in support of the rule. — The question is whether the justices have proceeded regularly. *Primâ facie* the surveyor of the highways is a party liable to repair by the common law, and then if the road turns out to be a turnpike-road, the turnpike surveyor is to be proceeded against. The proviso in sect. 94 points to the proceeding previously mentioned in the section, and means that if in the proceeding so previously directed against the highway surveyor, it turns out that the road is a turnpike-road, then that the justices shall summon the turnpike surveyor.

LORD CAMPBELL, C. J.—I am of opinion that this rule ought to be discharged. If the justices were bound to hear the summons against the highway surveyor in this case, they would be bound to convict an innocent man, and he would be held liable for not applying the funds of the parish to the repair of this turnpike-road. It would have been very strange if that had been so; but, on a view of this statute, I am of opinion that that was not the object or intention of the Legislature.

COLERIDGE, J.—If there had been no proviso in sect. 94, this case would clearly have been within sect. 113. Though it is perfectly right, if a highway is out of repair, to summon the surveyor of the parish, yet, on his coming in and making it appear that the road in question is a turnpike-road, the jurisdiction of the justices ceases. All that the proviso does is to give the justices jurisdiction as to turnpike-roads out of repair; not to bring in the rest of section to which such jurisdiction does not apply. Then, under this proviso, they may get the turnpike surveyor before them, and make an order for the repair of the road, but not convict him, as they can the surveyor of the highways. That is the mode

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of proceeding that ought to have been pursued in this case. The turnpike surveyor ought to have been summoned to show the state of the turnpike funds, and then, if they had been found insufficient, the highway surveyor. Up to this time the highway surveyor cannot be guilty of any default at all for which he should be fined.

WIGHTMAN, J.—The course that ought to be pursued is that pointed out by my brother Coleridge. Without the proviso in sect. 94 the 113th section would have applied.

ERLE, J.—Sect. 94 points out the course to be pursued. You get the parties liable to do the repairs, and none others, before the justices.

Rule discharged.

Ireland.

DUBLIN COMMISSION COURT, GREEN STREET.

(Before CRAMPTON J., and GREENE, B.)

REG. v. THE REV. VLADIMIR PETCHERINI. (a)

Evidence—Practice—Res gestæ—Declarations by persons engaged in unlawful acts—Crown witnesses not making informations—Statements by accused.

Statements made in the absence of the accused by persons engaged in an unlawful act are not evidence against the accused who had given directions for such act, unless it appear that all the parties were engaged on such act with a common unlawful object.

There is no rule which excludes the evidence of Crown witnesses who have not made informations.

Statements made by the accused not accompanying or connected with acts complained of can under no circumstances be given in evidence for him to show his intention.

The prisoner was indicted for wilfully and knowingly burning and causing to be burned certain authorized versions of the Holy Scriptures. The heap of books, amongst which it was alleged were the copies in question, was burned by direction of the traverser. It was proposed to give in evidence a statement (not in the prisoner's hearing) made by a boy who was one of a crowd round a fire, and was engaged in throwing books into the blaze. There was no evidence of this boy having been retained by the traverser, or of his having received any directions on the subject.

Held, that such statement was not admissible as part of the res gestæ, and did not come within those classes of cases, as riots and conspiracies, in which such statements would be evidence, as it did not appear that the accused and the person whose statement was offered in evidence were engaged in an unlawful act with a common unlawful object.

A witness was called for the Crown who had not made an information, and it was sought by the prisoner's counsel to shut out such evidence on the ground of such information not having been made.

Held, there was no rule to admit such evidence under the circumstances.

(a) Reported by P. J. M'KENNA, Esq., Barrister-at-Law

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The counsel for the prisoner sought to give in evidence statements and directions of the accused in sermons previous to the burning of the books in question, for the purpose of showing that he had only called in immoral publications to be brought in to be burned.
Held, not admissible.

*Evidence—
Bible burning.*

IN this case the traverser was indicted for having contemptuously and blasphemously burned and destroyed, and caused to be burned and destroyed, a certain authorized version of the Holy Scriptures.

There were several counts in the indictment, which as they are material, will appear in the charge of the learned judge to the jury.

The traverser pleaded not guilty.

The *Attorney-General*, the *Solicitor-General*, the Hon. *J. Plunket*, Q. C., *Corballis*, Q. C., and *Begtagh*, appeared on behalf of the Crown.

O'Hagan, Q. C., *Sir Colman O'Loughlan*, Q. C., *J. A. Curran*, *Coffey* and *Kernan* were counsel for the traverser.

From the evidence for the prosecution, it appeared that the traverser, who was a member of the order of Redemptionist Monks, and formed one of a mission who had been preaching and engaged generally in the cure of souls in the neighbourhood of Kingstown, had on the morning of the 5th of November last, about 8 a.m., engaged a couple of boys with wheelbarrows, to take a quantity of books and printed papers from the traverser's lodgings to the yard of the chapel at Kingstown. Several boys accompanied the barrows and entered the lodgings, for the purpose of assisting to remove the books and papers. The traverser opened the door, and brought the boys into the room where the books, &c., were lying under a table. There was another of the Redemptionist fathers present, and also a servant, who assisted in taking the barrows, and handing the books to the boys. The witness as to this part of the case did not open any of the books, but from the exteriors was able to say, there were amongst them a history of England, and also a book with a black raised cover, gilt at the edges, which he thought was a testament. There was, however, no printing at the sides or on the back. Witness had seen other copies of the bible, and thought from its appearance that the last-mentioned book was a small copy of the bible. This, however, was merely a conjecture of witness. When the barrow was loaded, the traverser desired the boys to take them to the chapel-yard and wait there for him. When the traverser came the books were thrown on the ground, and he desired them to be lit (burned), which was accordingly done. Witness was wheeling his barrow out of the way, and by the time he came back to where the books lay, they had been set fire to. After the fire was lit the traverser went away in the direction of the chapel and returned in about twenty minutes; traverser stood for a time at a distance of about thirty yards from the fire looking towards it, and after remaining about five minutes went away. Witness knew John Hamilton, and saw him at the fire. Hamilton was not one of the

boys who went to the traverser's lodgings and assisted in carrying away the books.

Several other witnesses were called to corroborate the above statements.

George Brown, examined by the Solicitor-General, lives at Kings-town. On the morning in question on returning from delivering bread at the wharf, saw a crowd at the chapel-yard, looked in through the rails, and saw books, &c. burning. Saw George Messent throwing books into the fire. Saw John Hamilton; he had a book in his hand, which he tore in two and threw into the fire.

The *Solicitor-General*.—We propose giving in evidence what John Hamilton said on that occasion, as part of the transaction. We have the traverser directing books to be burnt, the burning takes place, and what is said by the persons engaged under his directions in this work, is evidence. In *Lord George Gordon's case* it was held, that the cry of the mob might be received in evidence against the prisoner, as part of the transaction of which he had been the origin. There is another class of cases in which this evidence is admissible, namely, conspiracies, where verbal expressions accompanying or explaining acts of persons other than the accused, but connected with him, are admissible, even though the accused party was not present at the time: (*Hardy's case*, 24 How. St. Tri. 452, establishes this rule.) Take also the cases of riot, where in carrying out a particular unlawful object, the expressions of the persons engaged accompanying these acts, are admissible against others of the party, even though not shown to have been within their hearing. He also cited *R. v. Hardwicke*, 11 East, 585.

O'Hagan, Q. C. was stopped by the court.

CRAMPTON, J.—If there had been established here a common object, that of burning books of a particular description, then everything said by the parties engaged accompanying acts would be admissible. We have not here made out in evidence that common object which would make those cases cited applicable. In the *Manchester case*, (a) a placard which was at a distance was received in evidence against Hunt, because there was a common unlawful object proposed by the prisoner and those engaged with him. In this case we want that necessary element of a common unlawful object, to make the declaration of this boy Hamilton evidence.

GREENE, B.—I quite concur in the view taken by my brother Crampton. Hamilton is not connected in any way with the traverser. He is not one of the boys originally employed; he first appears when the burning was going on, and under those circumstances it is impossible to make his statements evidence against the traverser.

CRAMPTON, J.—If there were any evidence that the traverser countenanced him, it would be different.

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(a) *R. v. Hunt*, 3 B. & Ad. 574.

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Other evidence was given to show that fragments and leaves of bibles partly burned were picked up by persons in the neighbourhood of the fire.

Rebecca Whittle called and sworn.

O'Hagan, Q. C. objected to this witness being examined. We submit the Crown has no right to produce a witness who has not made an information. There is a rule on the Munster Circuit that unless a witness appears unexpectedly, and it is shown that the evidence of such witness should be excluded, it is not fair to an accused person that a witness should lie by or be kept back without making an information, and thus deprive a prisoner of means of cross-examination, or of making inquiries. Mr. Justice Perrin, as I am informed, is in the habit of excluding such testimony, unless it can be shown why informations were not made, and his reason is, that otherwise the prisoner would be deprived of the benefit of the act which entitles him to copies of the informations.

CRAMPTON, J.—I have been acting on a contrary rule for twenty-one years. I can pay no attention to any case not reported in print.

Coffey.—It was understood on the circuit that Mr Justice Perrin's ruling was according to the practice in England.

CRAMPTON, J.—I think you must be under a mistake. We cannot adopt such a rule.

GREENE, B.—concurred.

The case for the prosecution having closed.

O'Hagan, Q. C. addressed the jury for the traverser, and called James Coffey, who stated that he had been present at several sermons preached by the traverser in Kingstown chapel; recollected a sermon of his about immoral publications.

The *Attorney-General*.—If it is proposed to give evidence of what the traverser stated about this matter, I object to it as inadmissible.

CRAMPTON, J.—It is quite impossible to receive such evidence.

O'Hagan, Q. C.—It is a material part of the charge that the traverser knowingly caused the bibles to be burned, and thereupon, for the purpose of showing his intention in getting books together, I have a right to give in evidence his directions to the parties who brought in the books.

CRAMPTON, J.—I do not know on what principle a man's own declarations can be given in evidence for himself.

GREENE, B.—His own statements cannot be evidence in his favour on any principle I know of.

O'Hagan, Q. C.—The statement of the traverser was, that the books in question were brought in under the directions of the traverser. We do not propose to give any evidence of declarations subsequent to the transaction which would be open to the suspicion of being framed for this trial. It is with the view of showing what books were intended to be collected.

CRAMPTON, J.—If a man makes a declaration accompanying an act it is evidence; but declarations made two or three days, or a week, previous to the transaction in question cannot be evidence, otherwise it would be easy for a man to lay grounds for escaping the consequences of his wrongful acts by making such declarations.

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O'Hagan, Q. C.—After the opening of the Crown this objection takes us by surprise. In *The Queen v. Duffy*, my recollection is that speeches of the accused made months before were received, for him to show his intention.

GREENE, B.—We consider this evidence quite inadmissible. It may be true that declarations accompanying acts are admissible to show the intention at the time. The question of intention is certainly a very material one in the present case, but it is to be inferred from legal evidence of facts, and not from antecedent declarations by the traverser himself, upon occasions distant from and antecedent to the transaction. It is very true, as observed by the last counsel, that whatever Father Petcherini said to Duff, and to which Duff deposed, is admissible and material, because it is part of the transaction to which Duff deposes. But the question now is, whether the court are to admit, in evidence, declarations or sermons of the traverser on former occasions unconnected with the subject-matter of this trial. I say unconnected in point of time not accompanying but antecedent to the transaction. I am utterly at a loss to conceive upon what principle such evidence is admissible, or where the line is to be drawn, if such declarations made by accused parties in their favour—made no matter at what period of time antecedent to the transaction. I am quite unaware of any principle or authority that would warrant the introduction of such evidence.

CRAMPTON, J.—I entirely concur with my brother Greene in holding such evidence utterly inadmissible. From Mr. O'Hagan's statement I expected that such might be offered, and I therefore took an opportunity of looking into the matter yesterday evening, and satisfied my mind beyond a possibility of doubt that such evidence is admissible to show intention in only one class of case. That is, when there is an inquiry in a bankruptcy matter as to what was the intention of a man absenting himself, or doing some one of those things which, when made in contemplation of bankruptcy, amount to an act of bankruptcy. Declarations of such a person have been received to show intention in issues raised between third parties, because these declarations were made at the very moment of the act, explaining the act itself, accompanying it, and therefore *pars rei gestæ*; we must thereupon reject this evidence.

O'Hagan, Q. C.—After consultation said, that the counsel for the traverser would not call any witnesses, and requested their lordships to take a note of his having tendered evidence to the effect stated.

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The *Attorney-General* said that under these circumstances he would waive the right of the Crown to a reply.

GREENE, B., in charging the jury made the following observations on the indictment, and the law involved in the case:—The indictment in this case charges the traverser with having contemptuously, irreverently and blasphemously burned and destroyed, and caused to be burned and destroyed a certain copy of the authorized version of the Holy Scriptures, and with having so done with intent to bring the sacred Word of God, as contained in the authorized version of the Scriptures appointed to be read in the Established Church of England and Ireland, into disregard, hatred and contempt. In the second count he is charged with having in the like manner burned and caused to be burned a copy of the Holy Scriptures, commonly called the Holy Bible, with the intent of bringing same into hatred and contempt amongst the people of this country. He is further charged with having procured to be burned a certain copy of the New Testament with like intent; and in another count he is charged not with actually casting and throwing into the fire the Sacred Scriptures, but with causing and procuring same to be cast and thrown into the fire. There are two or three other counts which allege the intent to have been not to bring into contempt the authorized version of the Holy Scriptures, but to bring religion (that is the Christian religion) into discredit; and in two other counts there is the same charge, with no very material alterations, to which therefore it will not be necessary to call your particular attention. Although this case has occupied a great deal of time, and given rise to much discussion, it does not appear to me to present any feature of a difficult character, so far as relates to the law on the subject. With respect to the law of the case there can be no doubt that the charge imputed upon this indictment to the traverser is one of a grave and serious nature, and amounts by the law of the land to a criminal offence. It has been truly stated to you that the Christian religion is part and parcel of the law of this land. Any publication, or any conduct tending to bring Christianity or the Christian religion into disrespect, or expose it to hatred or contempt, is not only committing an offence against the Majesty of God, but is in violation of the common law of the land. Among the ways in which that offence may be committed is by exposing the Word of God, or any part of it, to obloquy or hatred. The highest authorities have laid down the law in that way, both ancient and modern. It is now for you, with these observations, to consider, first, whether you are satisfied in the way that I have described to you that any copy of the Holy Scriptures, or any bible of the authorized version was in point of fact burned. Next whether you have any reasonable doubt that the traverser knew it and sanctioned it. He could not have sanctioned it without knowing it; and if you are satisfied, beyond reasonable doubt, that he did know it, and did sanction it, then it will be your duty to find him guilty of a participation in the

act, which, as I have said, does not imply the actual burning with his own hands, but the authorizing of it. But if you have a reasonable and conscientious doubt, then unquestionably it is your clear duty to give him the benefit of that doubt. With regard to the third question it appears to me it follows, as of course, that the intention of that act could only be to bring into contempt the authorized version of the Holy Scriptures.

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CENTRAL CRIMINAL COURT.

(Before ALDERSON, MARTIN, BB., and WILLES, J.)

October Session, 1855.

Re STRAHAN, PAUL and BATES. (a)

§ 8 Geo. 4, c. 29, s. 52—Pleading double—Disclosure by banker, &c. In criminal cases a defendant cannot plead a special plea in addition to the general issue.

Example, under the 7 & 8 Geo. 4, c. 29, s. 52, a disclosure of any illegal act to which the statute relates must, to be rendered available as a protection, be made bonâ fide, and must not be a mere voluntary statement made for the express purpose of screening the person making it from the consequences of his acts.

THE defendants were indicted under the 7 & 8 Geo. 4, c. 29, s. 52, for that they, being bankers and agents to John Griffiths, and being entrusted by him with certain bonds for safe custody, without any authority to pledge or make away with them, did sell and convert the same to their own use. Other counts, for negotiating, transferring and pledging the same, and also for conspiracy.

On being arraigned, the defendants pleaded not guilty.

Sir F. Thesiger then applied, on behalf of the defendant Strahan, that he might be allowed to plead a special plea in addition to the general issue. By the 52nd sect. of the statute upon which the prisoners were indicted, it was enacted, that "no banker, merchant, broker, factor, attorney or other agent as aforesaid shall be liable to be convicted by any evidence whatever as an offender against this act, in respect of any act done by him, if he shall at any time

(a) Reported by C. B. ROBINSON, Esq., Barrister-at-Law.

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previously to his being indicted for such offence, have disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit or proceeding which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioners of bankrupt." A disclosure had been made, and it was the intention of the prisoners to give it in evidence, but a question might arise whether that could be done under the general issue, and therefore it was thought necessary to make an application that a special plea might be put upon the record.

ALDERSON, B.—Is there any authority for saying you can plead double in such a case as this? The right to plead double is given by the statute of Anne, but criminal cases are expressly excepted. I think there is a reported case against you.

Sir *F. Thesiger* could not produce any case in support of the application; but he understood that such a course had been allowed.

ALDERSON, B.—It would be error on the record if we were to allow two inconsistent pleas. If a prisoner pleaded a declaratory plea it used to be thought that when the issue was decided against him he had a right to plead over; but I recollect that in one case the point was looked into by Mr. Justice Williams and myself, and we decided that it was not a matter of right for a prisoner to be allowed to plead over. It is in the discretion of the court whether such a course should be permitted or not; and in the case in question, after judgment given against the prisoner, he was not allowed to plead over, but at once received sentence. (a)

WILLES, J., concurred.

It appeared in evidence that previously to the year 1854 the prosecutor had deposited with the prisoners, as his bankers, 5,000 Danish bonds for safe custody. In March, 1854, the bonds were taken from their place of deposit by the prisoners, and pledged with certain persons as a security for the advance of a large sum of money. In June, 1854, 5,000 other Danish bonds were purchased by the prisoners, to replace those which they had pledged. That in April, 1855, the last mentioned bonds were also taken from their place of deposit, and pledged in like manner with the former ones.

In June, 1855, the prisoners were duly adjudged bankrupts. On the 25th of June a meeting was held for the choice of assignees. The bankrupts appeared at that meeting, and by their counsel applied to be examined, and that they might be allowed to make statements with regard to the disposal of the securities that had been entrusted to them by their customers. The commissioner at first declined to allow any examination to be taken, as no creditor desired it, but he subsequently allowed a statement to be put in, and the bankrupts were permitted to depose to its truth, after which the deposition was signed by the commissioner. There

(a) The case referred to was probably *R. v. Fadernan and Others*, 4 Cox's Crim. Cas. 359.

was a joint declaration made and signed by the bankrupts. It was dated the 25th June, and was as follows:—

“The above-named bankrupts solemnly depose and declare that the statement now handed in by us to the official assignee under our bankruptcy is a true statement of the matters and facts therein contained, and contains a correct and true account of all and every bond and security which have been sold, pledged, or otherwise converted by us, or either of us, or by our direction or authority.”

The separate statement of Strahan was this:—“The account now filed in court contains a true account of all securities of my customers at any time pledged or converted by me, and the particulars can be found in the banking books, viz., a green stock-book and ledger.”

Paul's statement was the same.

That of Bates was in these words:—“The account now filed in court contains a true account of all the securities of the customers of our firm at any time pledged or converted by any of the partners hereof, and the particulars can be found in the banking books, namely, a green stock-book and ledger.”

The account referred to was put in and read in part. Among other things, it stated that the 5,000 Danish 5 per Cents. of the rosecutor bought by them (date not specified) were deposited with Messrs. Overend and Co. on the 13th April, 1855.

It appeared that on the statements and the account being put in, the solicitor for the fiat examined each bankrupt as to the truth of the statement and of the account.

Byles, Serjt., in addressing the jury, submitted several points of law for the consideration of the court. First—Was what took place in the Court of Bankruptcy such a disclosure as was contemplated by the act. It seemed to have in view not only a compulsory examination, but also a voluntary, or even what might be called an officious deposition. If the bankrupt underwent an examination, or made a deposition under any circumstances, the act would seem to protect him. But this was not a merely voluntary or officious statement, because by the declaration necessary to be made under the Bankruptcy Act a bankrupt was bound to make a full disclosure of all his property and effects. Here, however, the bankrupts were actually examined by the solicitor to the fiat. Then, again, it would seem that the statement made by the bankrupts, coupled with the account to which it referred, merely disclosed the dealing in April, 1855, with the substituted Danish bonds, whereas the indictment charged the pledging the original ones in March, 1854: but the statement referred the assignees to the books, which thereby became incorporated with it, and by them it would appear that the original bonds were disposed of at the time in question.

The *Attorney-General*, in reply, submitted that inasmuch as the charge in the indictment referred to the first disposal of Dr. Griffiths' bonds, any disclosure with regard to the subsequent disposal of the substituted bonds would not bring the defendants within the pro-

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tection of the act. And, further, that a voluntary statement, made under the circumstances detailed in evidence, was not such a disclosure as the statute contemplated.

ALDERSON, B. (in summing up).—If the defendants disposed of the original securities, any subsequent disclosure with respect to the sale of the substituted securities can be no answer to the charge. It is a disclosure of that which is no offence as an answer to something that is one. The statute is, no doubt, singularly worded, and its framers probably never dreamed that any such question would arise upon it as had been broached in the present case. But even if the disclosure had related to the subject-matter of the indictment, I am of opinion that it would not have been available. It never could have been intended that a person, by voluntarily disclosing any act, could evade the penalties of the misdemeanor to which such act had rendered him liable. People cannot thus be allowed to play fast and loose with the criminal law, now rendering themselves liable to be transported for fourteen years, and then by a mere process, got up for the purpose, voluntarily absolving themselves from the consequences of their acts. I have thought it right thus to express my opinion on this point, although it scarcely arises in the case, and in that opinion my learned brothers beside me concur.

The *Attorney-General*, *Bodkin*, and *Poland* for the prosecution.

Sir *F. Thesiger* and *Ballantine* for Strahan.

Serjeant *Byles* and *Hawkins* for Sir J. Paul.

E. James, Q. C., and *Parry* for Bates.

COURT OF CRIMINAL APPEAL.

(Before JERVIS, C. J., PARKE, B., WIGHTMAN, CROMPTON, and WILLES, JJ.)

November 24, 1855.

REG. v. LANDS.

Bankruptcy—12 & 13 Vict. c. 106, s. 253—Evidence of act of bankruptcy.

On an indictment against a bankrupt under s. 253 of 12 & 13 Vict. c. 106, for fraudulently obtaining goods on credit within three months of his bankruptcy, it is necessary for the prosecution to prove the act of bankruptcy and the other ingredients of the bankruptcy. Proof of the adjudication alone is insufficient.

The act of bankruptcy relied on was the filing of a petition by the bankrupt in the Insolvent Court, and a copy of the petition certified to be a true copy by the proper officer of the court, and made evidence of the petition by the 239th sect., was held to be no evidence of the date of the filing of the petition, although on the back of the petition there was an indorsement purporting to state when the petition was filed.

THE following case was reserved by Crompton, J. :

The prisoner was convicted before me at the September Old Bailey Sessions, 1855, on an indictment containing counts framed on the 253rd section of the Bankrupts Act, 12 & 13 Vict. c. 106. One set of counts was framed upon the first branch of the 253rd section, which makes it a misdemeanor, if any bankrupt shall within three months next preceding the filing of the petition for adjudication of bankruptcy, under the false colour and pretence of carrying on business and dealing in the ordinary course of trade, obtain on credit goods, with intent to defraud the owner thereof. Another set of counts was framed on the second branch of the same section, rendering it a misdemeanor if any bankrupt shall within such time and with such intent, remove, conceal, or dispose of any goods so obtained. In the course of the trial several objections arose, which I reserved for the opinion of the judges. The filing of the petition for adjudication in bankruptcy, and the adjudication of

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bankruptcy were on the 3rd of April, 1855. The first objection was to the sufficiency of the proof of the act of bankruptcy, and of the time when it was committed. The act of bankruptcy relied upon was the filing the petition in the Insolvent Court. The proof offered was a copy of the petition to the Insolvent Court, purporting to be signed by the officer in whose custody the petition was: (see 12 & 13 Vict. c. 106, s. 239.) The only proof offered as to the time of filing this petition was the indorsement on the back of the paper (amongst other things) of the time of the filing the petition.

The indorsement was as follows:

No. 65,076.

Mr. Commissioner Murphy.

First arrest 15th day of February, 1855.

Commitment 15th day of February, 1855.

Petition dated 22nd day of February, 1855.

Petition filed 27th day of February, 1855.

Vesting order 28th day of February, 1855.

(Copy) Petition of THOMAS LANDS.

Debtors prison for London and Middlesex.

Attorney, H. R. Silvester; address 18, Great Dover Street, Newington.

The only signature of the officer was in the inner fold of the paper, which contained as follows:

“In the Court for the Relief of Insolvent Debtors.

“I hereby certify the within to be a true copy of the petition of Thomas Lands.

“RICHARD WYTE.

“Deputy to Henry Simpson, Chief Clerk of the said court, in whose custody such petition now is.”

The second objection was, that by the use of the word bankrupt in the 253rd section, the legislature must be taken to have intended a person who had committed an act of bankruptcy before the obtaining the credit or concealing or removing the goods.

No act of obtaining or removing or concealing after an act of bankruptcy was proved.

The third objection related to the counts for obtaining the goods on credit. Some of these counts charged the prisoner with obtaining goods, the property of Henry Rooksley, and other counts charged him with obtaining goods, the property of William Langley. Rooksley proved that the prisoner came to him in Northamptonshire, and gave an unlimited order, on which he supplied him with goods to the amount of one hundred and sixty pounds five shillings, in about two days after the 14th December. When the prisoner accepted a bill drawn upon him for the first lot, about the 28th December, he sent another order, and the goods so ordered were dispatched on the 4th January, 1855. Rooksley was a shoe manufacturer in Northamptonshire, and sent the goods from that county to the prisoner in London. William Langley was also a

shoe manufacturer in Northamptonshire. The prisoner ordered from him on the 28th or 29th November, 1854, goods for shipping and for shop trade, and in pursuance of that order, goods were sent from Northamptonshire to the defendant in London on the 1st, 4th, 8th, 22nd, and 26th December, 1854, and on the 1st, 8th, and 15th of January, 1855. There was no evidence of any order or request to send any of the goods within the three months next before the adjudication of bankruptcy; and it was contended that the merely receiving the goods within that time in consequence of prior orders, did not constitute the offence of obtaining within the meaning of the statute.

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The last objection related to the counts for removing and concealing goods within the three months. There was no evidence of removing and concealing within the three months some of the goods ordered before the three months, and received by the prisoner after the commencement of the three months. It was contended that the removing and concealing within the three months, goods which had been ordered before the three months, and had been sent in pursuance of such order within the three months, did not constitute the offence of removing or concealing under this branch of the statute, and that the enactment referred only to cases of removing or concealing goods which had been obtained at such times and in such manner, and with such intent as to fall within the former branch of the section against obtaining goods on credit.

I respited judgment, and the prisoner remains in custody.

CHARLES CROMPTON.

Ballantine (Parry with him), for the prisoner.—There was no evidence here of the time when the act of bankruptcy was committed. The proof relied on by the prosecution was a certified copy of a petition of the bankrupt to the Insolvent Court. The 239th section enacts that a copy of any petition filed in the Court for the Relief of Insolvent Debtors in England, and of any vesting order, schedule, order of adjudication, and other orders and proceedings purporting to be signed by the officer in whose custody the same should be, or his deputy certifying the same to be a true copy of such petition, vesting order, schedule, order of adjudication, or other order or proceedings, and appearing to be sealed with the seal of such court, should, at all times be admitted, under this act, as sufficient evidence of the same, and of such proceedings respectively having taken place, without any other proof whatever given of the same. The copy, therefore, would be evidence of what was contained in it, but could be no proof of the time of the filing, the 74th section rendering the filing the act of bankruptcy. To remedy this, the indorsment was read, but the indorsement is not made evidence by the act, nor does the officer certify as to its correctness, even if it could be rendered available. There is no part of the Insolvent Act which renders an indorsement necessary. There was no evidence offered of the publication in the *Gazette*, and for all that appears the adjudication may have taken place before

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the filing. It is essential that the act of bankruptcy should be proved. In *R. v. Jones* (4 B. & Ad. 345) this was decided. The words in the 253rd section differ from those in the 251st. In the 253rd the language is "if any bankrupt shall," &c. In the 251st, it is "if any person *adjudged* a bankrupt," &c. It is clear, therefore, that the proof must materially differ in indictments framed upon the two sections. In the one case, proof of adjudication would probably be all that would be required; in the other, it would be necessary to show not only that he was adjudged bankrupt, but that he was properly so adjudged.

Francis (with him *Bodkin*), for the prosecution.—There was some evidence of the date of filing the petition. The petition itself, was on the 22nd February. The date of the adjudication was on the 3rd of April, and by the 35th section of the Insolvent Act (1 & 2 Vict. c. 110) the petition is to be filed forthwith.

PARKE, B.—The petition need not necessarily be filed for more than two months after it is signed.

WIGHTMAN, J.—The adjudication may have proceeded on some other act of bankruptcy.

Francis.—*Jones v. Nicholls* (3 Mo. & P. 12) shows that the certificate makes the indorsement of the date of filing, evidence.

JERVIS, C. J.—There the order was part of the instrument to which it was annexed.

WIGHTMAN, J.—Besides the certificate does not purport to certify as to the indorsement.

Francis.—It was not necessary to prove the act of bankruptcy at all, evidence of the petition and of the adjudication was sufficient. *R. v. Jones* was decided upon the old Bankruptcy Act (6 Geo. 4, c. 16) there there was no jurisdiction unless the commission actually issued. The court will apply the rule *omnia præsumuntur rite esse acta*.

PARKE, B.—Section 253 does not say if any person shall fraudulently obtain goods on credit, but if any *bankrupt* shall do so, surely there is a distinction between the two expressions.

Francis.—The word bankrupt there means any person who should within three months be adjudged to be a bankrupt: (*Canman v. South Eastern Railway Company*, 7 Exch. 843.)

JERVIS, C. J.—It appears to me that the objection suggested on behalf of the prisoner must prevail. By section 239 of the statute, the certified copy of the petition is admissible in evidence, but there is nothing to show the date when it was filed. The indorsement on the back of the copy is no part of the petition itself, and it is not made evidence by the act of Parliament. There is, therefore, no evidence as to when the act of bankruptcy took place. According to *R. v. Jones*, I think it was necessary for the prosecutors to prove all the ingredients of the bankruptcy. They have not done so. The conviction, therefore, must be quashed.

The rest of the judges concurred.

Conviction quashed.

Bodkin and *Francis* for the prosecution.

Dallantine and *Parry* for the defendant.

COURT OF CRIMINAL APPEAL.

Before JERVIS, C.J., PARKE, B., WIGHTMAN, CROMPTON, and
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November 24, 1855.

REG. V. SMITH. (a)

Larceny—Security—Scrip certificates of foreign company.

Certificates of shares in a foreign railway company are the subject of larceny within the 7 & 8 Geo. 4, c. 29, s. 5.

THE following case was stated by Mr. Russell Gurney.

At a general session of oyer and terminer and gaol delivery, holden for the jurisdiction of the Central Criminal Court on the 8th day of August last, H. I. Smith was tried before me upon the indictment hereinafter referred to, for stealing ten scrip certificates of a foreign railway company called the Great Luxemburg Railway Company.

The first count charged the prisoner with stealing ten securities or money, to wit, certificates, each entitling the holder thereof to ten half-shares of 10*l.* each, in the funds of a certain company called the Great Luxemburg Company.

The second count charged him with stealing ten securities for money, to wit, certificates of shares in the funds of the Great Luxemburg Railway Company.

The third count charged him with stealing ten securities for money, and ten pieces of paper.

The theft was proved by satisfactory evidence. The documents themselves were not produced upon the trial, but the annexed was shown to be a *facsimile*. Evidence was given that among dealers in railway stocks and shares upon the Stock Exchange in London, these documents were treated and dealt with under the name of Great Luxemburg Railway shares, and that they were scrip entitling the holders thereof to receive dividends, and that they passed by delivery as bank notes. No evidence, however, was given of the existence of any fund out of which

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

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such dividends were payable, or of the payment of any dividends, or of the existence of the Great Luxemburg Railway Company. Upon the trial the following objections were made:— First, That the documents were not within the provisions of the 5th section of the 7 & 8 Geo. 4, c. 29; and secondly, That although not within the provisions of the said section they were shown to be valuable securities, and consequently could not be properly described as pieces of paper. I, however, overruled both the objections in order that the opinion of the court for the consideration of Crown cases should be taken upon the subject, and the jury, under my direction, found the prisoner guilty on all the counts. Entertaining doubts as to the propriety of my ruling, I have to request the decision of the said court upon these points in the manner above stated, and whether such conviction can be supported on any grounds consistently with the facts hereinbefore stated.

Judgment was respited upon the prisoner, and he stands committed to the gaol of Newgate to abide the determination of this case.

RUSSELL GURNEY.

The following is the English text of the *facsimile* referred to:—

“Great Luxemburg Railway Company.

“Certificate to bearer,

“Ten half-shares.

“The holder of this certificate is entitled to ten half-shares of 10*l.* each, in the Great Luxemburg Company, subject to the statutes of the Société Anonyme, passed at Brussels the 11th of September, 1846, and sanctioned by royal decree of the 1st October, 1846, and to all the arrangements which have been made by the company. Interest at the rate of 5*l.* per cent. per annum will be paid on these half-shares until the line is opened from Brussels to Namur, after which the dividends will be derived from the surplus which may remain after payment of preferential charges.

In a paralleled column of the same page there was a French text to the same effect.

Metcalfe for the prisoner. The 5th sect. of the 7 & 8 Geo. 4, enacts, that “If any person shall steal any tally, order, or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of this kingdom, or of Great Britain, or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, or to any deposit in any savings’ bank, or shall steal any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever for money, or for the payment of money, whether of this kingdom, or of any foreign state, or shall steal any warrant or order for the delivery or transfer of any goods or valuable thing, shall be guilty of felony.” The question is, whether these documents are within the meaning of this section. In that clause of the

section, with respect to stealing securities for shares in the public stocks or funds, the words "or of any foreign state" are used. The word "foreign" is also used in the latter branch of the section, which speaks of securities for money; but they are omitted in the second clause relating to securities for shares in the funds of any body corporate, company, or society. In interpreting the section, therefore, it is clear that it was not meant to apply to securities for shares in a private company such as this is. The Legislature in making provision respecting corporations and companies generally means English corporations and companies only. It was at one time doubted whether the forgery of an instrument in this country payable abroad, or the uttering an instrument in this country forged and payable abroad was an offence within some of the repealed statutes: (*R. v. Dick*, 1 Leach. 68; *R. v. M'Kay*, R. & R. 71.) But it was afterwards decided that it was so in *R. v. Kirkwood*, 1 Moo. C. C. 311. At all events the 11 Geo. 4 and 1 Will. 4, c. 66, s. 30, expressly provided for such a case. In this very act, sect. 18, speaks of all companies generally, but in the very next section the case of foreign companies is specifically provided for.

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JERVIS, C. J.—I am of opinion that the conviction is right. The whole question turns upon whether these scrip certificates are within the meaning of the 5th section of 7 & 8 Geo. 4, c. 29. They are clearly within the mischief intended to be prevented by the act; and I think that the words of the statute are large enough to include them. The words in that clause of the section which immediately precedes, and in that which immediately follows the clause on which the indictment is founded, extend the otherwise limited meaning of the expressions "of public stock, funds, and money," and tend to show that the expression "funds of any body corporate, company, or society," in the intermediate branch were intended to have the larger construction; I think, therefore, that the word foreign, so far from restricting, was meant to enlarge the operation of these very words. When property comes into this country, it is within the protection of the laws, and the mischief is the same, whether the security stolen be for shares in an English or foreign company.

PARKE, B.—My first impression was, that the statute did not extend to securities for shares in the funds of a foreign body corporate, or foreign company. There are, no doubt, corporations abroad, but not perhaps precisely of the same description as our own, but savings' banks, which are mentioned in the section, are probably peculiar to this country. The reasons, however, given by my Lord have induced me to abstain from dissenting from the judgment he has given, though my mind is still not entirely free from doubt upon the subject. The case is clearly within the mischief contemplated by the statute.

WIGHTMAN, J.—I quite agree with what has fallen from my Lord Chief Justice. The use of the words "foreign state," where public funds or money is mentioned, rather strengthened the view

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that foreign securities are included in the general words which follow. A difficulty might arise with regard to the word money, and that difficulty is removed by the introduction of the words "of any foreign state." I think the language of the clause quite sufficient to include the case of stealing securities for shares in the funds of a foreign company.

CROMPTON, J.—My impression is the same as that of the rest of the court, although I am not so free from doubt as some of the members of it.

WILLES, J.—I think the conviction right.

Conviction affirmed.

Metcalf for the prisoner.

COURT OF CRIMINAL APPEAL.

April 26, 1856.(Before JERVIS, C. J., WIGHTMAN, CRESSWELL and ERLE, JJ.,
and MARTIN, B.)

REG. v. MARY ANNE STRIPP.(a)

*Evidence—Voluntary statement of accused made before a magistrate upon application for a remand.**A voluntary statement made by a prisoner in the presence of a magistrate, upon an application for a remand, is admissible in evidence, though the statement was not taken down in writing, and no caution was given by the magistrate to the effect prescribed by 11 & 12 Vict. c. 42, s. 18.*

AT the General Quarter Sessions of the Peace of our Sovereign Lady the Queen, holden at Reigate, in and for the county of Surrey, on Tuesday, the 8th April, 1856, Mary Anne Stripp was tried and convicted for stealing from her master upwards of 5*l*. in the dwelling-house of her said master, and was thereupon sentenced to one calendar month hard labour; but execution of such sentence was respited until the opinion of the justices of either bench and barons of the Exchequer should be given on the following point. Amongst the other articles which were proved to be so stolen was a cash-box containing upwards of 5*l*. in money, the property of the prisoner's master. This cash-box bore the marks of having been opened with violence. It was in the possession of the superintendent of police, who, being desirous of making a further search before the examination of the several witnesses at petty sessions, took the prisoner before a magistrate and applied to have her remanded, to enable him to make his intended search. In support of his application for a remand, the superintendent produced the cash-box and an iron chisel, stating his belief that it was with that instrument the prisoner had opened the box, upon which the prisoner spontaneously, and without any question having been put to her, said that she had not opened the box by means of the chisel, but by a hammer. No examination whatever was taken by or before the magistrates above referred to, who

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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merely granted a remand; but it will be seen by the deposition which follows that what passed on the application for the remand was given in evidence before the committing magistrates, and was taken down in writing as part of the deposition of the superintendent. This deponent, William Henry Biddlecomb, on his oath says as follows:—On Thursday last, the 20th March, from information I had received of the robbery, I went to the prosecutor's house accompanied by Inspector Martell. I commenced my inquiry and first of all ascertained the number of persons in the house on the Monday. My suspicions having been directed to the prisoner, I directed the inspector to make a minute search of the premises while I commenced searching the inside. From something that occurred during the search I felt it necessary to go to Thomas Ditton, the residence of the prisoner's mother, and I there apprehended the prisoner. I asked her for her purse and money. She said, "My mother has put it in her box." Her mother was not at home, but the lodger opened the box for me; I there found 30s. in silver, and 15*l.* 10*s.* in gold. On my way from Esher to Weybridge the prisoner cried, and said she wished to see her mother. On the Saturday, from something more told me, I went to the cell in which the prisoner was confined; I said to her, "I find you have made a statement to the officer; I am going to take you to a magistrate." She said, "You will find the money in the mill-pond; I threw it in because I thought the policeman suspected me when he came on the Wednesday; I threw away the Hanover coin and the half-guinea because it was not good." On the previous day (Good Friday) I had seen her in her cell; I told her her mother was coming to see her, but that I must give her this caution, that whatever she said to me or any one connected with the station, would be related to the magistrate and used as evidence against her. Her reply was, "I hope mother will come on Saturday." I placed her before Mr. Back and asked for a remand; she stated to Mr. Back that she had thrown the money into the mill-pond, and placed the cash-box in the coal-cellar. I produced a hammer and a chisel before Mr. Back, and said I believed the instrument (a chisel) now produced was used in breaking the cash-box; she said, "No, I did it with the chopper." When I apprehended the prisoner, I told her the charge. She said "I know nothing about it." At the proceedings before the committing magistrates, the charge was read to the said prisoner, and the several witnesses for the prosecution were examined in her presence. The prisoner, after the usual caution, was asked if she wished to say anything in answer to the charge, whereupon she said, "I am not guilty; the things which are now produced were not found in my box when first searched by Mrs. Holroyde." The deposition and statement of the prisoner above mentioned were produced at the trial, and the superintendent above referred to was examined, and gave the same statement as contained in his deposition, including the voluntary admission made by the prisoner before the magistrate first above mentioned on the application for

a remand, but the witness stated that the magistrate's clerk who took down his evidence had erroneously used the term "hammer" instead of "chopper."

The counsel for the prisoner objected that the statement of the prisoner in the presence of the remanding magistrate was not receivable in evidence at the trial, not having been then taken down in writing with the previous caution required by the statute.

The court held that, no examination whatever having been committed to writing on the application for a remand, but merely a statement being made by the officer as the reason for such application, the voluntary interruption of the prisoner at the moment was not governed by the rules relating to a statement made by a prisoner at the close of an examination before the committing magistrate; and the jury were directed that they might take into consideration the evidence of the witness of what passed before the magistrate on the application for the remand, including the statement voluntarily made by the prisoner.

The jury thereupon convicted the prisoner; and upon the application of the prisoner's counsel, the court reserved for the decision of the justices of either bench and barons of the Exchequer the question whether the voluntary statement of the prisoner in the presence of the remanding magistrate, the same not having been then committed to writing after the caution required by the statute had been previously given, was properly received in evidence at the trial?

The case was not argued by counsel.

JERVIS, C. J., delivered the opinion of the court.—We think that the statement of the prisoner was admissible, and that the conviction is right. The objection is, that it was made when she was brought up before a magistrate upon the charge, and that it was not then taken down in writing after a caution had been given to the prisoner in the terms prescribed by sect. 18 of 11 & 12 Vict. c. 42; but it appears to us, that that section only directs what is to be done by the committing magistrate when the examinations of all the witnesses for the prosecution have been completed, and their depositions are read over to the accused. Then it is that the caution is to be given, and any statement made by the prisoner is to be taken down in writing, and transmitted with the depositions; but we are of opinion that it was not intended by that provision to prevent the prosecution from giving evidence of any other statement voluntarily made by the prisoner, either before or after, or during the progress of the investigation before the magistrates.

Conviction affirmed.

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COURT OF CRIMINAL APPEAL.

April 26, 1856.

(Before JERVIS, C.J., WIGHTMAN, CRESSWELL and ERLE, JJ.,
and MARTIN, B.)

REG. v. LEECH. (a)

False pretences—Venue—Jurisdiction.

A letter containing a false pretence was received by the prosecutor through the post in the borough of C. ; but it was written and posted out of the borough. In consequence of that letter he transmitted through the post to the writer of the first a post-office order for 20l., which was received out of the borough :

Held, that in an indictment against the writer of the first letter for false pretences, the venue was well laid in the borough of C.

AT the Epiphany Quarter Sessions, held for the county of the borough of Carmarthen (being a court of separate jurisdiction from that of the county of Carmarthen), in 1856, John Layton Leech was tried for and convicted of obtaining money by false pretences. After the case for the prosecution had closed, but before the verdict was delivered, the advocate for the prisoner objected that the venue was not properly laid in the county of the borough of Carmarthen, and that the prisoner was not indictable there. The following evidence, as applicable to the objection, was given. The prosecutor John Matthews is the post-master of Carmarthen, and was so at the time the offence was committed by the prisoner. The prisoner was, in May last, when the offence was committed, an officer in the department of the General Post-office, acting as assistant-surveyor of the South Wales district, and on duty at Newcastle Emlyn, in the county of Carmarthen. On the 23rd April, 1855, the prisoner wrote the following letter to the prosecutor :—

“ Dear Sir,—Will you kindly send me 12l., and I will give you a warrant at the end of the month.

“ Yours faithfully,

“(Signed) JOHN L. LEECH.”

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

It appeared that the authorities of the General Post-office were in the habit of paying their officers by means of money-orders, which are called warrants. It appears, by the following receipt for a registered letter, that the prisoner received the 12*l.*, which he required :—

“ 12*l.* Received this 24th day of April, 1855, of the postmaster of Newcastle Emlyn, a registered letter addressed to John L. Leech, Esq., P. O., Newcastle Emlyn.

“(Signed) JOHN L. LEECH.”

On the 2nd May, 1855, the following letter was received by the prosecutor from the prisoner; it bore no date :—

“ My dear Sir,—I have got a warrant for 32*l.* 11*s.* 6*d.*; will you please send me the difference between 12*l.*, which I have had, and I will send you the warrant, or bring it myself. I will send you instructions to-morrow about the change at Cenarth Kilgenan, and

“ Yours faithfully,

“(Signed) JOHN L. LEECH.”

In compliance with the request of the prisoner, the prosecutor sent to the prisoner by post, in a registered letter posted at Carmarthen, 20*l.* 11*s.* 6*d.*, being the difference between the 12*l.* previously sent by the prosecutor to the prisoner, and the 32*l.* 11*s.* 6*d.* for which the prisoner alleged in his letter he had a warrant. By the following receipt for the registered letter it was found that the 20*l.* 11*s.* 6*d.* was received by the prisoner at Newcastle Emlyn, in the county of Carmarthen :—

“ 20*l.* 11*s.* 6*d.* Received this 3rd day of May, 1855, of the postmaster of Newcastle Emlyn, registered letter addressed to John L. Leech, Esq., P. O., Newcastle Emlyn.

“(Signed) JOHN L. LEECH.”

In each receipt for the registered letter, the amount contained in the letter was inserted in the receipt for the protection of the prosecutor. The following letter was addressed to the prosecutor by the prisoner, which, amongst other matters referring to the business of the post-office, contains the following paragraph :—

“ Gloucester, 10th May, 1855.

“ My dear Sir,—I will send you the warrant for 32*l.* 11*s.* 6*d.* in the course of three or four days. I was obliged to return it to London for correction.”

It was proved that the prisoner had not on the 2nd May, 1855, or at any period between that day and the 25th May, 1855, any warrant for 32*l.* 11*s.* 6*d.*, or for any other sum, and that the prosecutor had not, between the 2nd May, 1855, and the day on which the prisoner was tried, received from the prisoner any such warrant for the sum of 20*l.* 11*s.* 6*d.* received by the prisoner on the 3rd May, 1855. The false pretence of which the prisoner was convicted, is the statement in the prisoner's letter written at New-

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castle Emlyn, in the county of Carmarthen, and received by the prosecutor in the county of the borough of Carmarthen, on the 2nd May, 1855.

The money which the prisoner was convicted of obtaining by such false pretences, was the 20*l.* 11*s.* 6*d.* posted in a registered letter in the county of the borough of Carmarthen, and received by the prisoner at Newcastle Emlyn in the county of Carmarthen, on the 3rd May, 1855. The advocate for the prisoner urged that the false pretence was not made, nor the money obtained by the false pretence paid, in the county of the borough of Carmarthen, and that the Court of Quarter Sessions for the borough had therefore no jurisdiction to try the prisoner. The recorder thought the court had jurisdiction to try the prisoner, but, at the request of the prisoner's counsel, considered it advisable to request the opinion of the judges whether the venue was properly laid in the county of the borough of Carmarthen.

No counsel was instructed for the prisoner.

Bowen, for the prosecution, referred to 7 Geo. 4, c. 64, s. 12, which authorizes the trial in either county of an offence commenced in one and completed in another, and to *R. v. Jones* (1 Den. C. C. 551; S. C., 6 Cox Crim. Cas. 467); and contended that the delivery of the letter to the prosecutor within the borough was at least a commencement of the offence there.

JERVIS, C. J.—The venue was clearly well laid. The delivery of the letter through the post in the borough, was the making of a false pretence there.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

*April 26, 1856.*JERVIS, C.J., WIGHTMAN, CRESSWELL and ERLE, JJ.,
and MARTIN, B.)

REG. v. TOPPING. (a)

*my—Scotch marriage—British subject resident in England.**A subject, usually resident in England, and contracting a second marriage in Scotland during the life of his wife, is liable to be convicted of bigamy in England, under the provisions of 9 Geo. 4, c. 31,*

prisoner was convicted of bigamy at the last assizes for a county of Cumberland, but the learned judge (Martin, B.) delivered the following case for the opinion of this court:—

On the 2nd February, 1849, the prisoner Joseph Topping; a subject of Her Majesty, who was at that time usually resident at Carlisle, married in Scotland, and according to the law of Scotland, was then also in like manner resident in Carlisle. On the 1st November, 1854, Anne Ashton being alive, the prisoner, then also in like manner resident in Carlisle, married in Scotland, and according to the law of Scotland, Jane Lester, then also usually resident at Carlisle. The question reserved was—whether the prisoner had committed an offence against the stat. 9 Geo. 4,

the case was not argued by counsel.

JERVIS, C. J., delivered the judgment of the court.—We are of opinion that the offence was complete within the stat. 9 Geo. 4,

At the time of the second marriage the prisoner had been married in Scotland, and his wife was living. He comes within the words of the statute, “if any person married shall marry any other person during the life of the husband or wife;” and it is immaterial that the second marriage took place in Scotland, he being a British subject; because the words of the enactment are, “whether the second

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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 —British
 subject.*

marriage shall have taken place in England or elsewhere; and the limitation upon those words contained in the proviso is not applicable to this case. That proviso only excludes the case of "a second marriage contracted out of England by any other than a subject of His Majesty;" and it is clear, therefore, that the prisoner is a person who is brought within the operation of the statute, and the conviction is right.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

April 26, 1856.

(Before JERVIS, C. J., COLERIDGE, CRESSWELL and ERLE, JJ.,
 and MARTIN, B.)

REG. v. DAVIS, *alias* RUSH, and DAVIES. (a)

Misdelivery of letter—Appropriation of contents—Larceny.

A letter containing a post-office order was delivered by mistake to A., who after ascertaining that it was not intended for him, appropriated the contents to his own use:

Held, not guilty of larceny.

THE following case was stated by Erle, J.:—

The prisoners were convicted of stealing a post-office order, laid in the first count to be the property of the postmaster, and in the second count, that of William Davies. The jury must be taken to have found the following facts, viz.: William Davies, of Bishops Castle, put the post-office order in a letter into the post-office there for his son, having directed it to him thus: "John Davies, Pack-horse Inn, Welshpool." In Welshpool there were two inns of that name, called the Upper and the Lower Pack-horse. At the lower, John Davies, the son, was living; at the upper, John Rush, the prisoner, who had enlisted in the militia as John Davis, and was known by that name only in Welshpool, was billeted, and the letter was delivered for him there from the Welshpool post-office. He could not read, and took the letter to the other prisoner, William Davies, also billeted in Welshpool, who read it to him. John Davis then told him that the letter and order were not

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

intended for him, and William Davies advised him, notwithstanding, to keep them and get the money, and this they both immediately did, by applying to the post-office in the ordinary way. I told the jury, that, if at the time the prisoners received the order they knew it was not the property of John Davis, the prisoner, but the property of another person of known name and address, and, nevertheless, determined to appropriate it wrongfully to their own use, they were guilty of larceny; and that, in my opinion they had not received it until they had discovered, by opening and reading the letter, whether it belonged to John Davis the prisoner or not. I considered that the law of larceny laid down in respect of articles found was applicable to the article here in question. In respect to those articles the finder is guilty, if, after he has ascertained what the article is, and what are the marks of ownership, he determines to appropriate it wrongfully to himself: and so in respect of an article inclosed in a misdelivered letter, the question of wrongful appropriation cannot arise until it has been ascertained whether the letter has been misdelivered or not. I ruled, as above stated, but when I did so my attention had not been called to *R. v. Muchlow*, 1 Moo. C. C. 100; and on reading it I reserved the point whether, upon these facts and this ruling, the conviction was lawful? The prisoners were sentenced one to three months' and the other to six months' imprisonment, with hard labour, and they were ordered to be kept in the prison until this case should be determined.

The case was not argued by counsel.

JERVIS, C. J.—This case is governed by *R. v. Muchlow*, and the conviction, therefore, cannot be sustained.

COLERIDGE, CRESSWELL, and ERLE, JJ., and MARTIN, B., concurred.

Conviction quashed.

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v.
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alias
RUSH.
—
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—

*Larceny—
Misdelivered
letter.*
—

COURT OF CRIMINAL APPEAL.

May 3, 1856.

(Before JERVIS, C.J., COLERIDGE, WIGHTMAN and CRESSWELL, JJ., and BRAMWELL, B.)

REG. v. WOOD.(a)

Night-poaching—Unlawful entry upon land—Necessity of evidence to negative permission of owner or tenant.

In a case of night-poaching, it is not necessary on the part of the prosecution to call the occupier or the owner of the land to prove that the persons charged were not upon the land by their permission.

THE following case was reserved by Bramwell, B.:—
James Wood was indicted for being, with others to the number of three, unlawfully on land for the purpose of taking game, being armed. The case was proved, except that it was shown that the lands were the freehold of Jonas Spode, but in the occupation of one Johnson, a tenant of Spode. It was thereupon objected for the prisoner, that, to support the indictment, it must be shown he was "unlawfully" on the land, and that, to show he was unlawfully there, it must be shown by direct evidence, that he had not the permission of either the tenant or the landlord, if the game was reserved to him, and an authority to that effect was cited. The jury found the prisoner guilty, and, unless the particular proof suggested was necessary, there was abundant evidence not merely that the prisoner and those with him were on land which belonged to none of them, but also by their conduct that they were unlawfully there. In deference to the authority cited, I reserved this question for the Court of Criminal Appeal.

No counsel was instructed to argue for the prisoner.

Merewether, appeared for the prosecution.

BRAMWELL, B. mentioned, that the authority referred to was a case of *R. v. Edge*, decided by Martin, B., and cited by Mr. Sawyer.

Sawyer (*amicus curiæ*) stated, that Martin B. held, in a case of night-poaching, that either the landlord or the occupier of the land, whichever was entitled to the game, ought to be called to show that the prisoner was not on the land by their permission.

JERVIS, C. J.—There must have been something more in that

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

case. If men are on land at night, armed and doing violence, is the occupier to be called to deny that he had allowed them a day's shooting?

CRESSWELL, J.—If a policeman finds a man at night armed on the premises of another, is the landlord to be called to show that he did not give him permission to be there?

JERVIS, C. J.—We all think the conviction right.

Conviction affirmed.

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DUBLIN COMMISSION COURT, GREEN STREET.

October 25, 1855.

(Before MONAHAN, C. J., and RICHARDS, B.)

REG. v. MARY GOGARTY. (a)

Concealing child birth—What amounts to—Question for jury.

Although the child be laid in such a position that it does not necessarily follow that concealment was intended, yet if the jury find that such was the intention of the mother, it would seem that the offence is complete.

The child, for concealing whose birth the mother was indicted, was found lying on the bed covered by the quilt merely, and lying near the wall by the side of which the bed was placed.

There was no further attempt at concealment.

Held, that if the jury, from the other circumstances of the case, should be of opinion that concealment was the intention of the mother, she should be convicted.

Reg. v. Jane Perry [(1 Pierce & Dearsly, 471 ; S.C., Cox Crim. Cas. 531) be acted on.

THE prisoner was indicted for concealing the birth of her male child. From the evidence for the prosecution, it appeared that shortly before the time when she was delivered the prisoner was remarked to be in the family way. That on the afternoon of the day in question, the prisoner was found in her room sitting on the side of her bed, and when asked what was the matter, replied nothing. There was an appearance as if blood had been wiped up

(a) Reported by P. J. M'KENNA, Esq., Barrister-at-Law.

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—

from the floor of the room. That from the suspicions raised by the prisoner's appearance, a policeman had been sent for, who, on arriving, found the prisoner's door fastened, and was obliged to break into the room. On being again interrogated and asked if she had had a child, she several times denied it. The room having been searched, the body of a male child was found lying on the bed covered by the quilt and lying near the wall. The body of the child was dirty and covered with bits of straw. The witness stated to the court that there was no heap of straw or anything of that kind on the child, and that it was lying over the blankets and sheets, and under the quilt. There were no marks of violence on the child.

Smylie, Q. C., mentioned to the court the case of *Reg. v. June Perry*, 1 Pierce & Dearsly, 471; S. C., 6 Cox Crim. Cas. 531.

MONAHAN, C. J., in charging the jury:—"No doubt even if the child were born dead, it would be an offence to conceal the birth. The only question for you is, whether there was a concealment intended by the prisoner? If delivered according to the course of nature, or laid there without the design of concealing, there would be no offence. The fact of the prisoner's not answering or telling where the child was, does not constitute any offence. The only question for you, as I have already said, is, was concealment the object of the prisoner in placing the child where it was?"

The prisoner was convicted.

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DUBLIN COMMISSION COURT, GREEN STREET.

October 25, 1855.

(Before MONAHAN, C. J., and RICHARDS, B.)

REG. v. RYAN.(a)

—Passing sentence when judgment respited—Breach of undertaking by prisoner discharged without receiving sentence.

A prisoner, who has pleaded guilty, has been discharged without receiving sentence, on giving an undertaking, and entering into recognizance to appear and abide the judgment of the court upon receiving notice, afterwards violates his undertaking, the court will proceed to pass sentence upon the prisoner surrendering, after calling upon him to say why judgment should not be awarded.

Passing of a bill against the prisoner for an offence which would be a breach of his undertaking, will be regarded by the court as evidence to form itself of the prisoner's bad faith.

In this case a bill having been found against the prisoner for breaking and entering into a dwelling-house with intent to commit a felony, his wife; on his being put forward, Mr. J. J. O'Malley, Q. C. for the Crown, said that before proceeding with the case he thought it right to mention that there had been a previous conviction against the prisoner upon which judgment had been pronounced, and if the court would now proceed to pass sentence, the ends of justice might be effected without interfering with the present indictment. The former indictment, in which the prisoner had pleaded guilty, had charged the prisoner with abetting his wife with intent to disable, &c. and with intent to do grievous bodily harm. Upon that occasion the prisoner undertook to execute a deed of separation from his wife, who had wholly received the most cruel treatment from him, and he had undertaken thereafter not to annoy her, and on these terms judgment for the Crown consented to his being discharged without receiving sentence, on his entering into the usual recognizance to appear and abide the judgment of the court whenever duly called. As the prisoner had, instead of observing his

(a) Reported by P. J. M'KENNA, Esq., Barrister-at-Law

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undertaking, made a still more serious attack upon his wife, the Crown now moved the court that judgment should be passed upon the prisoner, and as evidence of the prisoner's breach of undertaking the finding of the present bill might be taken into consideration by the court.

The court having directed the officer to read the entries in the Crown books, it appeared that the prisoner was bound to keep the peace to his wife, and further, to appear when called on to receive the judgment of the court.

Baron RICHARDS asked the prisoner had he anything to offer why the court should not pronounce judgment upon him.

The prisoner proceeded to make a long rambling statement to show that he did not mean to injure his wife on the last occasion, and that he had no recollection of having a knife.

MONAHAN, C. J.—We are going to sentence you for the crime to which you pleaded guilty in June last.

The prisoner was sentenced to four years' penal servitude.

Ireland.

COURT OF CRIMINAL APPEAL.

April 16 and 17, 1856.(Before MONAHAN, C.J., RICHARDS, B., BALL and JACKSON, J.J.,
and GREENE, B.)

REG. v. JAMES COURTNEY. (a)

*Perjury—Materiality—Coroner's inquest—Question for judge—Nature
and extent of coroner's inquiry.**The duty of the coroner is not confined to ascertaining the cause of
death, but he should inquire into all the circumstances attending it; and,
therefore, when a witness has untruly answered on a coroner's inquest
that he and the deceased, with whom he had been in company, had not
been tippling, or in a public-house, on the evening preceding the death,
such answer is material to the inquiry, and will, if untrue, support an
indictment for perjury.**Semble,—The question of materiality is one for the judge and not the
jury to decide upon. Per Monahan, C. J., Richards, B., Jackson, J.,
and Greene, B. Ball, J., dubitante.**Perjury assigned, on answers of the prisoner, that he had not tasted any
intoxicating drink, or been in a public-house on a particular evening.
These answers were given on an inquest held on the body of a man
who had been found dead, but without any marks of violence or any-
thing to cause suspicion of his having died from other than natural
causes:**Held, nevertheless, directly material, as the coroner was bound to inquire
into all the circumstances attending death.**On the trial the judge had left the question of materiality to the jury,
who found the prisoner guilty: held, under these circumstances, that,
whether materiality be a question for the judge or the jury, the conviction
was right.**R. v. Lavey (3 Car. & K. 26), observed on.***T**HE following case was stated for the opinion of the court by
the Chief Justice of the Common Pleas:—James Courtney was tried before me at the last assizes for the
county of Kildare for perjury, alleged to have been committed by

(a) Reported by P. J. McKenna, Esq., Barrister-at-Law.

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him in a deposition made by him before a coroner while holding an inquest on the body of John Conolly. The indictment alleged that on the inquest it became and was a material question whether, on the 9th of December, the said James Courtney, Patrick Carroll, and John Conolly, or either of them, had drank any intoxicating liquor after they had left the Police Barrack, and before they had, on the evening of the same day, arrived at the guard-room of the 60th Rifles; and that, on the said inquest, he the said James Courtney swore that neither he the said James Courtney, Patrick Carroll, and John Conolly, or either of them, had tasted any intoxicating liquor at the time they arrived at the guard-room of the Rifles, or between that time and the time of their leaving their barracks, whereas, in truth and fact, they and each of them had during that interval drank a large quantity of intoxicating liquor, to wit, two noggins of whisky.

There was another assignment of perjury, on a statement in Courtney's deposition, that they were quite sober at the time of their arrival at the guard-room, whereas, in fact, they were not sober, but, on the contrary, intoxicated and under the influence of intoxicating liquor.

The first witness for the Crown was Robert Cooke Carter, the coroner of the county, who proved that he held an inquest on the 11th and 12th of December on the body of John Conolly, a constable of police, who died on the 18th of December, that the prisoner Courtney was examined as a witness, and made and signed the deposition which he produced and which was read. He also produced and proved the other proceedings at the inquest, which I received as evidence of the holding of the inquest and proceedings thereat.

The next witness for the prosecution was Patrick Doyle, who proved that he was doing business in a public-house on the Curragh; that Courtney, Carroll, and Conolly came to the public-house about seven o'clock on the night of the 9th of December, and had some whisky and punch; that they left in a short time, and returned again to the public-house in about an hour, that is, about eight o'clock, and had a noggin of spirits; that they left in a short time after drinking the spirits.

John McOwen, a waiter in the public-house, proved that, on the second occasion deposed to by the previous witness, he had seen the three policemen in the public-house; that he had served them with a noggin of whisky, but that, not having spoken to them, and their coats being buttoned up, and they muffled, he was not able to identify them.

Michael Harman also proved that he was in the public-house on the 9th of December last, the Sunday night before the inquest, saw the three policemen, Courtney, Carroll, and Conolly, get a noggin of whisky. Conolly gave witness part of it. Conolly and Courtney drank the remainder of the noggin.

Thomas Priest, a soldier of the 60th Rifles, proved that, on the night of Sunday the 9th of December, about half-past ten o'clock,

the prisoner Courtney, Conolly, and another policeman, came to the guard-room of the Rifles; they said they had lost their way; they appeared to be intoxicated; they remained about ten or fifteen minutes and then went away.

This was the case for the prosecution. At the close of the case, a discussion arose as to whether the evidence supported the perjuries assigned. I was of opinion that there was sufficient evidence that the prisoner and the two other policemen had taken intoxicating drink in the interval between leaving the Police Barrack and coming to the guard-room of the Rifles, but not as to the party having been intoxicated. A discussion then arose as to whether the matter, which I considered there was evidence of being false, was material, and whether I was to decide whether it was material or to leave it to the jury.

It was not alleged, on the part of the Crown, that there were any grounds for supposing that the deceased Conolly had come by his death from any act of the prisoner's or any one else, and that he had died from the effects of having been exposed to the night air.

If I had been obliged to decide as to the materiality of the question, I would have held it immaterial; but, at the instance of the counsel for the Crown, I left the question of materiality to the jury, at the same time informing them that as no case was made at the inquest, and as there were no grounds for supposing that the deceased had committed suicide, or that any one had committed a homicide, that it did not occur to me how the question, as to whether the police party had drank, was material, at the same time I left the question of materiality to the jury.

The jury found the prisoner guilty of perjury, being of opinion that the question was material. I respited sentence until the next assizes. The prisoner, not being able to find bail, he remains in custody.

I beg leave to submit for the opinion of the court the following questions:—

1st. Was the materiality of the matter, in which the false swearing was proved, a question of fact to be found by the jury, or a question of law to be decided by me?

2nd. If the question of materiality was for the jury, was there any evidence of such materiality sufficient to be submitted to the jury?

3rd. If the question of materiality was for the court, and not for the jury, should I have held the question to have been material or immaterial?

4th. Is the conviction of the prisoner a valid conviction, or is it invalid, and such as should be reversed?

JAMES H. MONAHAN.

A copy of the indictment was annexed to the case. The following extract contains so much as will be found necessary:—

“And the jurors first aforesaid, &c., do further present that, at and upon the said inquest, it became and was a material question

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whether, on the said 9th day of December, in the year aforesaid, the said James Courtney, John Conolly, and Patrick Carroll, or any of them, had drank any intoxicating liquor during a certain space of time, to wit, during the space of time elapsed between the time of the said departure of the said James Courtney, John Conolly, and Patrick Carroll from the said constabulary barrack and the time of the said arrival of the said James Courtney, John Conolly, and Patrick Carroll at the said guard-room of the said Rifle corps; and that, at and upon the said inquest, it also became and was a material question whether, on the said 9th day of December, in the year aforesaid, the said James Courtney, John Conolly, and Patrick Carroll respectively, were sober and free from the influence of intoxicating liquor during the said space of time so as aforesaid elapsed between the said departure and the said arrival of the said James Courtney, John Conolly, and Patrick Carroll. And the jurors, &c. present that the said James Courtney being so sworn as aforesaid, &c. &c. did knowingly, wilfully and maliciously, before the said jurors so sworn as aforesaid, and before Mr. Robert Cooke Carter, coroner, as aforesaid, upon a certain examination and deposition then and there in that behalf made and taken, did depose and swear in writing, amongst other things, in substance and to the effect following, that is to say, 'I (meaning the said James Courtney) positively declare on my oath (meaning the oath of the said James Courtney) that neither the deceased (meaning the said John Conolly) nor sub-constable Carroll (meaning the said Patrick Carroll), nor I (meaning the said James Courtney) had tasted drink (meaning intoxicating liquor) at the time we (meaning the said James Courtney, John Conolly, and Patrick Carroll) arrived at the guard-room of the Rifles (meaning the said guard-room of the said Rifle Corps), nor between that time (meaning the time of the said arrival of the said James Courtney, John Conolly, and Patrick Carroll, at the said guard-room) and the time of our leaving our barracks (meaning the time of the said departure of the said James Courtney, John Conolly, and Patrick Carroll, from the said constabulary barrack), and that both the deceased (meaning the said John Conolly) and Carroll (meaning the said Patrick Carroll) were quite sober during the entire time (meaning the said space of time so as aforesaid elapsed between the said departure and the said arrival of the said James Courtney, John Conolly, and Patrick Carroll) and thereby them (meaning that none of them the said James Courtney, John Conolly, and Patrick Carroll) had drank any intoxicating liquor during the said space of time so as aforesaid elapsed between the said departure and the said arrival of the said James Courtney, John Conolly, and Patrick Carroll, and thereby them (also meaning that each of them the said John Conolly and Patrick Carroll) was sober and free from the influence of intoxicating liquor during the said space of time,' whereas, in truth and in fact, &c. &c."

J. A. Curran.—There are two objections to this conviction.

The statements on which the perjury was assigned were not material to the inquiry before the coroner, and further, the judge ought to have decided the question of materiality and not left it as he did to the jury. [GREENE, B.—Is this your proposition, that in all cases the question of materiality is for the judge and not the jury, or is it in this particular case you contend he ought to have decided it?] I think he ought to have left to them whether certain facts were proved, and if they thought they were, that they showed the prisoner's statements to be material, and should find the prisoner guilty. In *The Queen v. Lavey* 3 Car. & Kirw. 26), which is the only case which can be cited on the other side, it is very doubtful if it is not an authority in my favour. In that case perjury was assigned on untrue answers of the prisoner when cross-examined as a witness in a County Court proceeding. The prisoner had, on her cross-examination, sworn falsely that she had never been tried at the Old Bailey, and had never been in custody at the Thames Police Station. After the case for the prosecution had been proved, the counsel for the prisoner called for an acquittal, urging that the evidence on which the perjury was assigned was immaterial. When Lord Campbell, who tried the case, asks this question: "Is materiality a question for the judge?" The prisoner's counsel insists that it is, and that the judge should direct an acquittal, because there was no evidence of materiality. His lordship thought, however, there was, and refused to stop the case, and, in leaving the case to the jury, we find this passage in his charge, "I cannot say the evidence was not material." *Rex v. Dunstan* (Ryan & Moody, 109), is an authority for both propositions, that the question is for the judge, and that the prisoner's statements were not material. In that case it was held, that the denial of an agreement, which by the Statute of Frauds was not binding on the parties, was immaterial and irrelevant, and that the prisoner was entitled to an acquittal. The perjury charged was contained in an answer in Chancery, and it was contended for the prisoner that the denial of an agreement, which the court had no power to enforce, was immaterial and irrelevant to the investigation of the several matters in the bill in Chancery, and that, consequently, as the false statements of the prisoner could not affect the results of the Chancery cause, they were not material, and that he was entitled to an acquittal. In that case, Abbott, C. J., says: "It is necessary that the matter sworn to, and said to be false, should be material and relevant to the matter in issue; the matter here sworn is, in my judgment, immaterial and irrelevant, and the defendant must be acquitted." I contend that, in the present case, whether the prisoner and others had been drinking in a public-house in the evening in question, could have no effect on the finding of the prisoner's jury, as the cause of death was, beyond all question, accidental. He also cited *R. v. Philpots* (5 Cox Crim. Cas. 362); *R. v. Ball* (6 Cox Crim. Cas. 360); and *R. v. Nicholls* (1 Barn. & Ald. 21.) In none of these cases did the judge leave the whole

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case to the jury. In *Reg. v. Overton* (Car. & Mar. 655), the fifteen judges decided, as a question of law, upon the materiality of the answer on which the perjury was assigned.

Berwick, Serjt. (with whom *Corballis*, Q. C., *Battersby*, Q. C., and *Crawford*), for the Crown.—First, as to the way in which the materiality is stated in the indictment, it is sufficient to state it thus generally, and from facts which would establish this averment. It is not necessary to set out *in extenso* those particulars which would show that the answers on which perjury was assigned were material, 2 Chitty's Crim. Law, 307a. As to leaving the question of materiality to the jury, his lordship was right in the course he took on the trial. In *Rex v. Dowlin* (5 T. R. 311), which was an indictment for perjury, there were two questions raised, by motion in arrest of judgment, one that the general averment of materiality was not sufficient, the other, that under the peculiar circumstances of that case the answers of the prisoner were not material, and Lord Kenyon thus disposes of them:—"But it has been objected that it was necessary to set forth in the indictment so much of the proceedings of the former trial as will show the materiality of the question on which the perjury is assigned. If it were necessary, and if the question arose on the credit due to the witness, the whole of the evidence given before must be set forth: but that has never been held to be necessary, it having always been adjudged to be sufficient to allege generally that the particular question became a material question. That allegation was wanting in *R. v. McKeron*, and that was held to be a decisive objection. But here it is averred that the question on which the perjury was assigned was a material question, and the jury have found it to be so by their verdict." Hence, it appears, that the question was left to the jury, and that no objection was raised or suggested to so doing. [JACKSON, J.—I don't think that means anything more than that the jury found the prisoner guilty.] As to the question of materiality, there is something more to be inquired into by the coroner than the actual cause of death, as murder, *felo de se*, or accident. The summary of the Duties of the Coroner by Britton is to be found in the Appendix to Baker on Coroners, and it is stated in Article 26: "If the coroner do find that any one hath come to his death by misadventure, let him then inquire by what accident, whether by drowning, or by a fall, or by killing without other prepensed malice, or was a felon himself. If the accident happen by drowning, let it be inquired whether it was in the sea, or fresh water, or in a well, moat, or ditch, and how the person became drowned; also from what vessel he fell, what things were in the vessel, to whose hands they came, and of what value, and who first found the body. If the drowning was in a well, let it be inquired who owned the well;" and similar particulars are pointed out at length in subsequent articles as to the duty of the coroner. I say the prisoner's answers were material in two ways, both as to the inquiry whether the death were felonious or otherwise, and as to the circumstances attending it. It is not necessary

that the jury should have been influenced by the prisoner's answers, if they were not true, and if they were intended to mislead. I say, if it was material to ascertain whether death had been caused by intoxication, or from exhaustion and exposure, and if it were material to ascertain whether the prisoner and the deceased had been intoxicated, it was a step to that inquiry to ascertain if they had been drinking in a public-house on the evening in question. Whether such fact would or would not throw light on the cause of death, it was equally material on a coroner's inquiry, as the coroner was bound to inquire into all the circumstances preceding and accompanying the death. *Reg. v. Overton* shows that any matter which may be a step in the proof of the subject to be inquired into, no matter how slight, is material. In *Reg. v. Overton* (Carring. & Marsh. 655), it is expressly decided by the fifteen judges, on a Crown case reserved, that every question on the cross-examination of a witness which may mislead the jury, is material, and Lord Denman says: "You cannot dispute that everything that comes out on a trial is material, if it goes to the credit of the witness;" and Lord Abinger says: "Every question on cross-examination which goes to the credit of the witness is material. If a witness were asked in cross-examination whether he was in such a place at such a time, and he denies it, that would be material if it went to his credit."

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GREENE, B.—*Reg. v. Overton*, I think, shows that the question of materiality is one for the judge, as, in that case, the judge who tried the case, after consulting with Baron Parke, decides the question, and again, that is one of the questions reserved for the fifteen judges, and on which they decided. There is also a case in 10 Q. B.(a), in which you will find, on the argument of a rule for a new trial, one of the points was, that the third count of the indictment depended on the materiality of a fact, which was not material, and on this the Court of Queen's Bench decided the point as a matter of law. I can conceive an exceptional case, where the judge may leave the question of materiality to the jury, subject to certain instructions.

Berwick, Serjt.—To leave every question of fact to the jury is the course dictated by common sense, as well as constitutional law. The grand jury, when bills are before them such as this, decide upon the question of materiality. The prisoner suffers nothing, if the answers on which perjury was assigned were material, because, if the judge had decided the question, he ought to have decided against him, and the jury, as a matter of fact, have decided against him. He also cited Haw. P. C. Cor. 433; 2 Burne's Justice of the Peace, 48; 1 Bacon Abr. (Tit.) Coroner.

J. A. Curran, in reply.—As to the argument drawn from the practice of the grand jury, it might equally be argued that they were proper judges as to whether a proceeding were judicial or not, as they find in this case that the perjury was committed in a judicial proceeding.

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MONAHAN, C. J.—In this case, the questions argued, or rather some of them, are of great importance. Having had time to consider, we do not think we require further time before giving judgment, and that we may now dispose of the case. The first question which has been argued is, whether the answer of the prisoner, that certain persons, amongst whom was the prisoner, had not been drinking on a particular night, was material or not? This is the substantial point in the case before us. At the trial, not having had an opportunity of considering the nature of the inquiry which is held by coroners, I was of opinion that the answer was not material. It occurred to me then, as it was virtually conceded both on the inquest and on the trial before me, that there was no suggestion of a felony having been committed by the prisoner, that rendered it material to inquire into the circumstances connected with the death of the deceased, and that as the death was admittedly accidental, it was not material to ascertain whether the parties had, or had not, been in a public-house. However, on further investigation of the authorities cited, and the cases as to the duty of coroners, and what the inquiry ought to be on the inquest, and on referring to the passages in Hawkins and elsewhere on the subject, we consider that the opinion I entertained on the trial, as to the duty of the coroner, was not correct. His duty is to inquire into all the circumstances attending, or which might have caused, the death of the person upon whom the inquiry is held. That being so, it at once became material to ascertain whether or not death had not been caused, to some extent, by the deceased having been tipping in a public-house, and, therefore, in a state to render it more probable that he should have lost his way. Although there was not evidence that the persons in this party were drunk, yet the way in which they separated on the evening in question, was a proper subject of inquiry for the coroner. We, therefore, think the statement, that they had not tasted drink, or entered a public-house in the interval stated, was a material subject of inquiry, and if it were in my province to decide it, that I should have decided against the prisoner. Then, as to the other question that has been argued, namely, whether I ought to have decided the question of materiality, and not have left it to the jury, we are of opinion, that it is not absolutely necessary to decide that one way or the other in this case. As far as my individual opinion goes, I am disposed to think the question is one for the judge. As for the case of *The Queen v. Lavey*, which has been cited by the prisoner's counsel, I do not look upon it as an express decision that the question is one for the jury. I think the course generally taken is right, and that it is for the judge and not the jury to decide the question of materiality, and if it were necessary, would be prepared to decide, that in this case I ought to have ruled the point and not left it to the jury. Even supposing this course had been taken, and that I should have directed the jury to find him guilty, we are all of opinion there is nothing erroneous in the conviction. As to the case before Lord Campbell,

I do not think it established a new rule. The question there arose in this way. There was a trial before the judge of a County Court, on that trial there was a controversy as to whether certain goods had been sold by the prisoner to the defendants in the County Court proceedings; on cross-examination, the plaintiff having been asked had she been charged with certain offences in the Central Criminal Court, denied having been ever in the dock, charged, or tried for a criminal offence. The question before Lord Campbell was, were her false answers material to that inquiry. The materiality depended on this: were those answers calculated to influence the judge as to her faithworthiness. It may have been considered by Lord Campbell that, whether her answers were likely or not to influence the judge, was a jury question. I do not feel called on, however, to offer an opinion on that case. I do not think the case can be taken as an authority one way or the other. For my part I shall, in future, rule that the question of materiality is for the judge, unless I hear express authority to the contrary. We are, however, all of opinion, that the answer of the prisoner, on which the perjury was assigned, was, in fact, material, and that I should have so ruled it, and that the conviction must be affirmed.

RICHARDS, B.—I concur with the judgment pronounced by my Lord Chief Justice that the question of materiality is one for the court and not for the jury, and therefore I think it is for the court to tell the jury that the subject-matter of the indictment either was or was not material. I think the case before Lord Campbell has been pressed too strongly. The question there was with reference to an answer which affected the character and credit of the witness, and not to any matter of fact which affected directly the issue to be inquired into. It was with regard to the prisoner's own faithworthiness. Possibly, if she answered these questions truly, they might not have affected her evidence, but it was left to the jury to say whether they might affect her general character and faithworthiness. It was the office of the County Court judge to dispose of the facts, and it was necessary for him to know the character of the plaintiff in that case, and Lord Campbell, under this particular state of facts, left it to the jury to consider whether the matters imputed to the witness, if she had answered truly, might not have affected her general character. In that sense, and that only, it seems to me, was the question left to the jury by Lord Campbell. I think it right to say thus much, because I believe the court is not unanimous on the question as to whether the materiality of the prisoner's answer is for the judge or the jury to decide upon.

BALL, J.—I concur in thinking that the answer of the prisoner here, on which perjury was assigned, was material on the inquiry before the coroner, and consequently that the conviction is right. But as to the point, whether the question of materiality is for the judge or the jury, I wish to be understood as not expressing any opinion. In 1850, for the first time in either country is the question raised, and I put it in the very words of Lord Campbell.

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Is materiality a question for the judge? and how does he answer the question? By leaving it as a question to the jury. My brethren have put it, that he may have done so under the peculiar circumstances of that case; he, however, does not put it on the special circumstances. The course he took may have been from the peculiarity of the case, and, from some defect in the report, it may not appear. Be that as it may, it is sufficient, in the present case, that we all think the answers were material, and we have that opinion confirmed by the jury, so that, no matter which may be the proper tribunal to decide, the prisoner has been properly convicted.

JACKSON, J.—In this case, although there is no difference of opinion on the main question for our determination, namely as to the validity of the conviction, it may be right for the members of the court to express their opinions on the questions raised. It is only necessary for us to decide whether this conviction is valid or invalid. We hold that the conviction was valid; and I think it would be too much to say it was invalid, because a course the most favourable for the prisoner was taken. The main question on which the validity of this conviction must depend is this—was the prisoner's answering, on which the perjury has been assigned, material or immaterial, to the subject-matter of testimony on the inquest? and on that there is no difficulty. We are all clearly of opinion it was material, and not on the ground of its affecting the character or credit of the prisoner, but because it was material for the coroner to ascertain, not alone the actual cause of death, as murder, *felo de se*, or otherwise, but also all the circumstances attending it. Now, to ascertain the way in which the deceased spent the evening before his death was surely a necessary part of his duty. I do not feel called on to decide whether the question of materiality is for the judge or the jury, and it might be rash to do so unnecessarily; but it does appear to me after being referred to a great deal of authority, that the uniform practice has been for the judge to determine it as a question of law, and no case has been cited to throw doubt upon it before that case of *R. v. Lavey*. I think that case may be explained so as not to affect the previous course of practice. In that case there was properly a question for the jury, namely, whether the plaintiff's credit might be influenced by her answering truly, reserving any other question of law.

GREENE, B.—I concur as to the propriety of convicting the prisoner on the grounds stated by my Lord Chief Justice, because I consider that the question and answer on which the perjury was assigned were material, and whether it be the province of the judge or the jury to decide the question, the fact having been found by the jury in the way in which the judge ought to have directed them, I think the conviction is right. If it were necessary to decide the abstract question, as to whose province it is to decide as to materiality, I should have required further time to make up my mind fully on the subject; but if it were now necessary, I

should have little hesitation in agreeing with all except my brother Ball, for it appears to have been the uniform course of practice for the judge to decide whether the state of facts falsely deposed to were material or not to the inquiry upon which these false statements were made. I have always been accustomed to consider the question as one for the judge and not for the jury. I was rather surprised to see the point reserved for this court; but, after that case of *R. v. Lavey*, I should have taken further time to make up my mind on the point; as it is not absolutely necessary, I do not wish this to be considered a solemn decision of the court upon that point, although I have a strong opinion that the question is one for the judge and not the jury. On the other points I have no doubt whatever.

Conviction affirmed.

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COURT OF CRIMINAL APPEAL.

May 3, 1856.

(Before JERVIS, C.J., WIGHTMAN, CRESSWELL, and ERLE, JJ.,
and BRAMWELL, B.)

REG. v. HENRY HODGSON. (a)

Forgery—Intent to defraud—Altering the name in diploma of College of Surgeons.

Notwithstanding the statute 14 & 15 Vict. c. 100, s. 8, which renders it unnecessary in an indictment for forgery to allege an intent to defraud any particular person, it is essential to a conviction that such an intent should be proved; and where a diploma of the College of Surgeons was altered by substituting one name for another and changing the date, and the person who altered it did so in order to induce a belief that he was a member of the college, but had no intent to commit any particular fraud or specific wrong to any individual: Held, that he could not be properly convicted of forgery at common law.

HENRY HODGSON was indicted at common law for forging and uttering a diploma of the College of Surgeons. The indictment was in the common form. The College of Surgeons has no power of conferring any degree or qualification, but before admitting persons to its membership, it examines them as to their surgical knowledge, and, if satisfied therewith, admits them and issues a document called a diploma, which states the membership. The prisoner had forged one of these diplomas. He procured one actually issued by the College of Surgeons, erased the name of the person mentioned in it and substituted his own, and changed the date and made other alterations to make it appear to be a document issued by the college to him. He hung it up in his sitting-room, and, on being asked by two other medical practitioners whether he was qualified, he said he was, and produced this document to prove his assertion. When a candidate for an appointment as vaccinating officer, he stated he had his qualification and would show it if the person inquiring (the clerk of the guardians who were to appoint to the office) would go to his (the prisoner's) gig. He did not, however, then produce and show it.

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

The prisoner was found guilty. The facts to be taken to be that he forged the document in question, with the general intent to induce a belief that the document was genuine, and that he was a member of the College of Surgeons, and that he showed it to two persons with the particular intent to induce such belief in those persons, but that he had no intent in forging or in the uttering and publishing (assuming there was one) to commit any particular fraud or specific wrong to any individual. Bramwell, B., reserved for the opinion of the Court of Criminal Appeal the question whether, on these facts, he ought to have been found guilty on any of the counts.

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Byrne for the prisoner.—The conviction is wrong. The jury have found that the prisoner had no intention to injure or defraud any particular individual, and without such an intention, the offence of forgery was not complete, according to the authorities cited in 2 Russ. 362. The cases of *R. v. Toshack* (4 Cox Crim. Cas. 38; 1 Den. C. C. 492), and *R. v. Sharman* (6 Cox Crim. Cas. 312), are distinguishable. In *R. v. Toshack*, the prisoner forged a Trinity House certificate of fitness to act as a pilot; and, in *R. v. Sharman*, the prisoner forged and uttered a certificate of qualification for the office of schoolmaster to the very persons in whose gift the office was. There the intent to deceive and defraud those very persons was clearly established; and the decision in *R. v. Toshack* went upon the ground of the serious public mischief which might result from the forgery of a document of that nature. [ERLE, J.—I do not see any great distinction between the danger of loss of life at sea, through the employment of an incompetent pilot, and the danger of loss of life on land through the employment of an incompetent surgeon.] The pilot's certificate confers a distinct privilege, and is essential to the employment. It is that upon which those who employ him rely; but the diploma of the College of Surgeons has not the same efficacy. It is not a degree; and gives no special privilege; nor is it in general relied upon by those who employ the surgeon. Here there was no intent to use the forged instrument for the purpose of defrauding any particular person or persons; whereas, in *R. v. Toshack*, there must have been such an intent. [JERVIS, C. J.—There would have been some difficulty certainly before Lord Campbell's Act (14 & 15 Vict. c. 100) in alleging the intent to defraud. Who could have been named? Nobody could have been named. There was no attempt to utter it to any one for the purpose of defrauding that one. The intent must exist at the time of the forgery, and here the evidence fails to prove that. The diploma may have been altered many years ago; and the prisoner had kept it in his own possession. [WIGHTMAN, J.—Was there not evidence of an intention to defraud the guardians?] Certainly not at the time of the forgery; and there was no subsequent uttering to them.

Scotland, contra.—It is not necessary in a case like this that an intention to defraud any individual should be proved. It is enough if there was a general purpose of deceit; and if the fraud was of such

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a nature that some persons might be injured thereby, the document in question being of a public nature: (1 Hawk. P. C. c. 70, s. 11.) It is found in the case that the College of Surgeons has no power of conferring any degree or qualification; but the diploma is evidence of membership; and, practically, it entitles the holder to numerous privileges, some of which are conferred by statute upon members of the college as such. The Sanatory Acts, the Gaol Acts, the acts relating to compulsory vaccination, and to the care and treatment of lunatics are instances; and the proper discharge of the responsible duties imposed by these enactments is a matter of public concern. [BRAMWELL, B.—But the possession of the diploma cannot be said in any way to confer these privileges, which depend upon the statutory enactments.] Still they render it a matter of great public importance that none but duly qualified persons should be able to represent themselves as members of the College of Surgeons; and on that ground it becomes an indictable offence at common law for an unqualified person to attempt, by any fraudulent contrivance, to represent himself as a member of the college. In East's Pleas of the Crown, forgery is defined to be the making or altering of a written instrument "for the purpose of fraud or deceit." [ERLE, J.—Would it not have been enough to allege an intent to deceive divers persons to the jurors unknown, to wit, all the patients of his late partner; and would not that have been proved?] It is submitted that it would. [JERVIS, C. J.—I should consider that a dangerous doctrine.] In *R. v. Ward*, 2 Ld. Raym. 1461, it appears to have been assumed that if the fraud might injure any one the offence would be committed. [JERVIS, C. J.—Hardly so, for the indictment there did contain an allegation of intent to defraud the Duke of Buckingham, whose order was forged.] In 2 Russell on Crimes, 357, a case is cited from 1 Levinz, 138, where it was held to be forgery to produce a false certificate for the purpose of obtaining holy orders; and that case, as well as *R. v. Toshack* and *R. v. Sharman*, are strongly in point. [JERVIS, C. J.—Upon reference to Levinz, it appears that the case there was an application for a prohibition to stay proceedings in the Ecclesiastical Court, with a view to deprive the offender of orders, which it was suggested he had obtained by forgery; and the court refused the prohibition.] Lord Campbell's Act (14 & 15 Vict. c. 100, s. 8) not only dispenses with the necessity of alleging an intention to defraud any particular person, but also with the necessity of proving it. [JERVIS, C. J.—Formerly the indictment must either have alleged an intent to defraud a person named, or, as you say, have shown that that was unnecessary, on account of the public nature of the instrument forged. Now the particular person need not be named; but with that exception the law is not altered. The intent to defraud, if alleged, must be proved; or, if not, the public nature of the document should appear. [BRAMWELL, B.—The difficulty is, that at the time when the instrument was forged, no intent to defraud anybody was proved.] All that the prosecution need establish is,

that there were persons who might be defrauded, which clearly appears upon the case; and that there was an intention to defraud, of which there was evidence, and which is found by the jury.

JERVIS, C. J.—I am of opinion that the conviction is wrong. The recent act (14 & 15 Vict. c. 100, s. 8) does not alter the nature of the offence, though it permits a general form of pleading; and without expressing any decided opinion upon the nature of this document (though, as at present advised, I should not say that it was of a public nature), I think the conviction cannot be sustained, because at the time of committing the forgery there was no intent to defraud any one; nor was there any uttering afterwards with intent to defraud. Though he had the intent to defraud when the clerk to the guardians was inquiring about his qualification, yet he did not at that time produce the document.

WIGHTMAN, J.—I do not think that there was any intention on the part of the Legislature, in passing Lord Campbell's Act, to dispense with the proof of any of the essential ingredients of the offence, and if there is no intention to defraud anybody there is no offence. In this case no such intention was proved to exist at the time when the instrument was altered.

CRESSWELL, J., ERLE, J., and BRAMWELL, B., concurred.

Conviction reversed.

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COURT OF CRIMINAL APPEAL.

Nov. 30, 1855, and May 3, 1856.

(Before LORD CAMPBELL, C. J., JERVIS, C. J., PARKE, ALDERSON, and PLATT, BB., WIGHTMAN, CRESSWELL, EBLE, WILLIAMS, CROMPTON, and WILLES, JJ.)

REG. v. ROEBUCK. (a)

False pretences—Misrepresentation of the quality of an article offered as a pledge—Evidence of similar attempt to obtain money.

A false and fraudulent statement to a pawnbroker, that a chain offered as a pledge is silver, is indictable as a false pretence under the statute of 7 & 8 Geo. 4. c. 29, if money be thereby obtained; and upon the trial of such an indictment evidence is admissible of misrepresentations made by the prisoner to others about the same time, and of the possession by him of a considerable number of chains of the same kind.

If the false statement be made with intent to obtain money, but the prosecutor relies entirely upon his own examination of the chattel, and not at all upon the prisoner's statement, the latter cannot be convicted of the complete offence, but is guilty of an attempt to commit it.

THE prisoner, William Roebuck, was indicted at the Liverpool Borough Session, held on the 28th day of August, 1854, for fraudulently obtaining ten shillings by falsely pretending that a chain was a silver chain. The prisoner called at a pawnbroker's shop with a chain, on which he asked for an advance of ten shillings. The pawnbroker asked if the chain was silver, the prisoner replied that it was silver. The pawnbroker then examined the chain, and tested it with an acid. The chain resembled, in appearance, greasy silver, and withstood the test as if it were silver. The pawnbroker then lent the prisoner ten shillings on the chain, which he took as a pledge. He paid this money, relying on his own examination and test of the chain, and without placing any reliance on the statement of the prisoner. Evidence was admitted to prove that the prisoner, a few days afterwards, offered a chain, similar in appearance, to another pawnbroker, requesting him to advance ten shillings upon it. Objection was made to the admission of this evidence. Twenty-six similar chains were found on the person of

(a) Reported by A. BRITTON, Esq., Barrister-at-Law.

he prisoner when he was apprehended. An assayer proved that these chains were not silver, and that the chain pledged was not silver, they were all made of a composition worth about a farthing an ounce, and that each chain was of much less value than ten shillings. The jury were told, that, as the money had not been obtained by the prisoner's statement, the completion of the offence charged in the indictment was not proved; but that, if they were satisfied of the fraudulent intent of the prisoner, and that his design was to obtain the money by means of his false statement, they might convict the prisoner of an attempt to commit the misdemeanor charged against him in the indictment. The jury accordingly found the prisoner not guilty of the misdemeanor charged in the indictment, but guilty of an attempt to commit the same. The prisoner was also tried on another indictment on a similar charge, and with a similar result. The prisoner was sentenced on each indictment to twelve calendar months' imprisonment, the terms to commence at the same time. Under these sentences he is still in custody at the Liverpool Borough Gaol. The questions intended to be submitted for consideration are whether there was any false pretence within the meaning of the stat. 7 & 8 Geo. 4, c. 29? Whether the evidence objected to was properly received? and whether the prisoner was properly convicted of the attempt to commit the misdemeanor charged against him?

This case was first set down for argument on the 24th November, 1855, before Jervis, C. J., Parke, B., Wightman, Crompton, and Willes, JJ.; but was afterwards (November 30) by direction of the court, re-argued before the judges whose names appear at the head of this report.

No counsel was instructed on the part of the prisoner.

Brett for the prosecution.—The prisoner was convicted of an attempt only, under the stat. 14 & 15 Vict. c. 100, s. 9; but the substantial question here is, whether, if the prosecutor had been induced to part with his money by the false assertion of the prisoner, he could have been found guilty of the complete offence? *ALDERSON, B.*—So far as he was concerned, everything was done to complete the offence.] But the money was not obtained by means of the false pretence; and that is essential to the completion of the offence. The prisoner endeavoured to get the money by the false pretence; but that attempt was defeated, because the prosecutor relied entirely upon his own judgment. Then the main question is, whether this is a case within the statute at all; and the suggestion, on the part of the prisoner is, that the statute does not apply to mere misrepresentations as to the value and quality of goods in the course of a bargain respecting them, because in those cases, the goods are the consideration for the money, and that the representation in this case was of that kind; but in fact this is the case of a party being induced to enter into a contract by a fraudulent misrepresentation as to the subject-matter of it; and if the result is, that he parts with money or goods to the

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person making the false pretence, the latter cannot set up the contract in answer to the charge. A contract so obtained is void for all civil purposes, and cannot be held to give any validity to a transaction which would otherwise be criminal. [LORD CAMPBELL, C. J.—Is this anything more than a false statement as to the value of the article?] Yes; it is a false statement as to the quality of it. [ALDERSON, B.—If the false representation be confined to value, I do not see how the statute can apply; because unless the thing were wholly worthless, the statement would be in part true—and how could the line be drawn?] Here the representation was wholly false, because the chain was not silver. It was altogether a different thing from that which was represented. The case, therefore, is brought within the words of the statute, and the principle of all the decisions. All that the statute or the decisions upon it require is that there should be a knowingly false representation of something as an existing fact, and that the money or goods should be obtained thereby; and whether there has been such a representation with such a result, is a question for the jury in each case. *R. v. Kenrick* (5 Q. B. 49) is a leading case upon the subject. There, upon the sale of a horse, the defendant falsely and fraudulently represented that the horse was the property of a lady, quiet to ride and drive, and not the property of any horse-dealer; and he was held guilty of obtaining money by false pretences. Upon the authority of that case *R. v. Abbotts* (1 Den. C. C. 273; S. C. 2 Cox Crim. Cas. 430) was decided. There the prosecutor was induced to buy a particular cheese by the false pretence that a piece offered to him to taste was taken out of that cheese, whereas, in truth, it had been taken from a superior one. *R. v. Codrington* (1 Car. & P. 661), *R. v. Adamson* (2 Moo. C. C. 286), and *R. v. Ball* (Car. & M. 249), are all cases in which convictions were sustained, though the fraud was carried out partly by means of a contract between the parties. There are also several cases in which the statute has been held to apply, where money has been obtained by passing off as genuine flash notes and other false instruments. *R. v. Coulson* (1 Den. C. C. 592; S. C. 4 Cox Crim. Cas. 227); *R. v. Wells*, tried before *Littledale, J.*, in 1840, where a Bank of Elegance note was uttered; *R. v. Freeth* (R. & R. 127); and *R. v. Dundas* (6 Cox Crim. Cas. 380), where false labels were used upon a sale of blacking. In some instances the offence has been committed by the assumption of a false character; as that the prisoner was a member of the University of Oxford (*R. v. Barnard*, 7 Car. & P. 784); or a single man (*R. v. Copeland*, Car. & M. 516); or a medical practitioner who had cured a particular person (*R. v. Blomfield, ib.* 537); or that he was connected in business with a certain firm (*R. v. Archer*, 1 Dears. C. C. 449; S. C. 6 Cox Crim. Cas. 515.) A case very similar to the present was recently tried before Alderson, B., at the Old Bailey; but there was an acquittal on the ground that the misrepresentation was made, not by the defendant, who was the shopkeeper, but by his shopman. In that case the customer purchased a gold chain,

relying upon the statement that it contained a certain quantity of gold, whereas, in truth, it contained very much less. [ALDERSON, B.—I should certainly have left that case to the jury, if the person indicted had either made the representation or authorised it to be made.] In *R. v. Matthews*, tried before Parke, B., at the Lent Assizes for Kent, in 1841, the defendant, who obtained a watch in exchange for articles which he fraudulently represented to be gold, was convicted; and in *R. v. Stevens* (1 Cox Crim. Cas. 83), where the defendant, who had always before brought silver ingots, substituted pewter, and said that they were the same as before, and thereby obtained money, the indictment was sustained. The last case on this subject is *R. v. Eagleton* (6 Cox Crim. Cas. 559; 24 L. J. M. C. 158); and there a baker, who contracted to supply the poor with bread, and delivered short weight, was held to be properly convicted of an attempt to obtain money by false pretences, because he returned to the relieving officer tickets specifying the full weight. According, therefore, to all these decisions, the present case is within the statute, and would, indeed, before the statute, have been indictable at common law as an attempt to obtain money by means of false tokens.

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Cur. adv. vult.

JUDGMENT.

LORD CAMPBELL, C. J.—In this case, which has been standing for judgment for some time, we are of opinion that, both upon principle and according to the decided cases, the conviction is right.

CRESSWELL, J.—I am of opinion that this conviction is right, upon the authority of decided cases.

ALDERSON, B.—I am of the same opinion; not agreeing with the decided cases, but yielding to their authority.

WIGHTMAN, J.—I am of the same opinion, as I feel myself bound by the authority of the decided cases upon the question.

LORD CAMPBELL, C. J.—I wish to be understood that if this were *res integra*, I should not agree with *The Queen v. Abbott*, because I think that there the intention of the prisoner was to obtain a better bargain, and not, *animo furandi*, to get the possession of money; but, that having been decided by ten judges, I do not wish on the present appeal to disturb it. But, in the present case, I think that it is quite clear that the chain not being of silver at all, or not being the article it was represented to be, and being to the prosecutor of no value, it is clearly upon principle a case of false pretences within the act of Parliament, for the intention was to get the money merely, the ten shillings and sixpence; and if there be nothing like an equivalent, nothing of any real value, it is like the case of the flash note, where the paper may be of some little value, just as the chain was here, but it is of no real value to the prosecutor. Therefore I think it is clearly a case, upon principle, within the statute respecting false pretences. And I must say, with great respect to those who differ from me, that, with regard to the present case, I have never entertained any doubt; but I do

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not wish it to be understood that I should have approved of the rule supposed to be laid down in *The King v. Kenrick*, and which was acted upon in *The Queen v. Abbott*, for the cheese in that case was of real value to the prosecutor, and he only had not so good a bargain as he would have had if there had been no trick resorted to. There I should have thought it was not a case within the statute, but that it was more like the case before my brother Littledale, where he said that a covenant for title was not within the statute; without, however, laying down any such doctrine as that in no case of contract or supposed contract could the statute apply. But the ten judges having decided in *R. v. Abbott* as they did, I do not mean to say that I question their decision, but I should certainly not have concurred in it if it were *res integra*. And, without carrying the law so far in this case of *Reg. v. Roebuck*, it seems to me clear that it comes within the act of Parliament.

JERVIS, C. J.—I have not thought it necessary to say anything in this case, because I concur with the rest of the court to the full length of supporting this conviction. I know that many of my brothers concur in that view simply because they have felt themselves bound by the authorities. I abstain the rather from making observations, because, as we acknowledge that we are bound by the authorities, I thought it more prudent not to throw out doubts as to decisions by which, at the same time, we confess ourselves bound, lest we should shake the authority of cases to which we adhere; and further, because, as the general result is but the affirmance of the conviction justified by authority, everything which is thrown out otherwise is merely conflicting opinion, and not to be binding in other cases. I concur with the court in the result that the conviction should be affirmed.

CROMPTON, J.—I do not see any reason to disagree with the judgment which has been pronounced, after the decided cases, and I should agree with Lord Campbell if the case had found that the chain was of no value; but it is not so stated. However I concur in the decision, because the case falls within that of *Reg. v. Abbott*.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

May 3, 1856.

(Before JERVIS, C. J., WIGHTMAN, CRESSWELL, ERLE, MAULE,
WILLIAMS, and CROMPTON, JJ., PARKE and PLATT, BB.)

REG. v. BURGON. (a)

False pretences—False representation that a house was built upon land offered as security for a loan.

A. applied to B. for a loan upon the security of a piece of land, and falsely and fraudulently represented that a house was built upon it.

B. advanced the money upon A. signing an agreement for a mortgage, depositing his lease, and executing a bond as collateral security:

Held, that A. was properly convicted of obtaining money by false pretences.

CHARLES BURGON was tried before me (H. Bliss, Esq., Q.C.) on Thursday, the 20th July, 1854, at the assizes for the county of York, on an indictment charging him with having obtained, upon false pretences, a certain valuable security called a banker's cheque, of the value of 80*l.*, from William Fretson, his property. The evidence against the prisoner was as follows:—William Fretson, the prosecutor,—I am a solicitor, living at Sheffield. Last year the prisoner employed me professionally to prepare a contract for building a house and workshop upon land near Sheffield. In December last, early in the month, prisoner came to me and asked me for the loan of 80*l.* He told me the builder had finished the house and workshop, and that he (prisoner) was short of money, to pay for extras, and that he (prisoner) should have the lease in a day or two. On the 8th of December, he (prisoner) came again, and brought me the lease.

(The lease is put in and read. Date, 13th August, 1853. From the Governor of the Free Grammar School Estate, Sheffield, to the prisoner.) There is a plan in the margin. The property is all described as in a new street, called Greaves-street, and with metes and bounds. The prisoner left it (the lease) with me. And he said, "I have built a very capital house on the land, and some workshops, and it is a very nice piece of land; can you find me the

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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80*l.* upon it, without putting me to the expense of a formal mortgage? They are worth near 300*l.*, and I hope you will save me the expense of a mortgage." The prisoner said, also, that he had to pay the builder for some extras, that there was a dispute about them, and that he owed a little something on the original contract for building. I, in consequence, said I would let him have the money on the deposit of the lease, and on an agreement to execute a mortgage on my request, and also on his bond. I prepared a memorandum of deposit (the agreement). I gave him the cheque. I was induced to give him the money on the representation that the house and workshop were worth 300*l.*, and built upon the piece of land in the lease. In February last, at the end of the month, I made inquiry about the land. I then sent for the prisoner, and said to him "you have been committing a very gross fraud. The house and workshop which you said you had built on this land, were built on another piece. And you have mortgaged them to another solicitor for 250*l.*, and there is nothing built on the land, in the lease deposited with me." He (prisoner) said, I know I have been very wrong, I hope you will forgive me. I said no. It is false pretences. He said, he had hoped to be able to bring the money back again before I found it out.

On cross-examination.—The land is two miles and a half from Sheffield, where I live. The land adjoins the land on which the house and workshop are built. There is nothing to distinguish or separate the lands. When I prepared the contract for building we had some conversation about it. He the (prisoner) said the builder had furnished the house and shop, and made a very good shop; I never went to the place before advancing the money. The land, if so built upon, would have been ample security. The house and shop were sold for 250*l.* The prisoner signed the bond and agreement before I gave him the cheque.

(The bond, the agreement, and the cheque put in and read for the prosecution.) It is usual to take a bond as well as a mortgage or an agreement for it. The prisoner cried very much when I said I had found it out. I would not have given him the money unless he had signed the bond and agreement, and deposited the lease; nor would I have given him the money on his bond, agreement, and deposit of lease, unless for the false pretence that the house and shop had been built upon the land.

John Townsend.—I am the surveyor of the Grammar School estate. I have seen the lease and plan, and read the description, and I have seen the land there mentioned, and there is no building on it. The land is of less value without buildings. The land is worth as building land 3*s.* 5*d.* per yard per annum. The house and shop are on the adjoining land.

Cross-examined.—I set out the land. I could not find the land in question by the description in the lease. I know Mr. Fretson. I am known as the surveyor to that estate.

John Webster.—I am a solicitor at Sheffield. I produce a mortgage and lease of land. The lease was deposited with me.

the mortgage. I attested it. The mortgage put in and read with house and shop thereon from the prisoner to witness. The evidence it was contended, on the part of the prisoner, the proximate cause of obtaining the cheque and money was tract of bond and mortgage, and that the false pretence by an antecedent inducement to the prosecutor to enter contracts, and lend the money upon such securities, there being no question of the *bona fides* of the transaction, except the false pretence that preceded it, the jury to be directed that the evidence proved that the money or was not obtained upon the false pretence stated in the indictment leaving doubts upon this point, I reserved the question. And, that it might be submitted to the Court of Criminal Appeal, the jury, that if they believed the witnesses there was sufficiency of the offence charged in the indictment. The jury duly found the prisoner guilty, and I did not pass sentence. I now humbly to request the opinion of this court upon propriety of that conviction, and upon the question so reserved; respectfully annex copies of the indictment, and of the bond and mortgage to be referred to as part of this case.

Following is a copy of the agreement referred to. "Memo-
I, Charles Burgon, of Sheffield, in the county of York, blade manufacturer, have this day deposited with William of Sheffield aforesaid, gentleman, an indenture of lease, dated 1st of August last, and made between Governors of the goods, lands, and revenues of the Free Grammar School of James, England, within the town of Sheffield, in the county of the one part, and me, the said Charles Burgon, of the other part, and concerning a piece or parcel of ground situate at or alkley in the parish of Sheffield aforesaid, for securing to William Fretson the repayment, on demand, of the sum of £500 day lent and advanced by him to me, with interest for the same at the rate of 5*l.* per cent. per annum. And, as a further security, I have also this day given to the said William Fretson my bond for the penal sum of 160*l.* for securing to him the said sum of £500 and interest. And I hereby agree and undertake, whenever required by the said W. Fretson, and at my own costs and charges, to execute a good, valid, and effectual mortgage of the premises comprised in the said lease, and the dwelling-houses, shops, and other buildings erected thereon for securing the repayment of the said sum of 80*l.* and interest, so intended to be used as aforesaid, such mortgage deed to contain the usual covenants of sale, indemnity to purchasers, and other covenants and incidental thereto, as the said William Fretson shall think fit. Witness this 9th day of December, 1853."

The case was argued Saturday, February 3, before the judges named.

for the prisoner.—This case is not within the statute. The prisoner did not advance his money in consequence of the false pretence; but on account of the security which he obtained,

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the bond and the equitable mortgage. The parole representation was antecedent to the contract, upon which the money was parted with; and that contract having been reduced into writing, is alone the evidence of the consideration upon which the money was lent. Besides, independently of any other objection, an obtaining of money by way of loan, is not within the statute. The prosecutor did not intend to part with the property; he expected that the money would be returned. [CROMPTON, J.—Not the same money; he only expected to be repaid the same amount.] However, upon the main question *R. v. Codrington* (1 Car. & P. 661) is expressly in point. There the prisoner sold and conveyed to the prosecutor an estate, with a covenant for title, although he had previously sold his interest to a third person; and Littledale, J. said: "Certainly a covenant in a deed cannot be taken to be a false pretence;" and further "The doctrine contended for, on the part of the prosecution, would make every breach of warranty or false assertion at the time of a bargain, a transportable offence. Here the party bought the property, and took, as his security, a covenant that the vendor had a good title. If he now finds that the vendor has not a good title, he must resort to the covenant. This is only a ground for a civil action." That case and the present are distinguishable from *R. v. Kenrick* (5 Q. B. 49), and *R. v. Abbott* (2 Cox Crim. Cas. 430; 1 Den. C. C. 273.) In both cases, the prosecutor relied entirely upon the false statement. Besides, in *R. v. Kenrick*, the judgment proceeded mainly upon the counts for conspiracy; and in *R. v. Abbott* there was a trick resorted to for the purpose of putting the prosecutor off his guard. Secondly, as to the objection that the money was advanced by loan only, some support is given to that by the note of Mr. Greaves to the case of *R. v. Crossley* (2 M. & Rob. 17; 2 Russ. on Crimes, 305.)

Hardy, contra.—As to the second point, Patteson, J. expressly overruled it in *R. v. Crossley*, and though the editor of Russell has suggested a doubt as to that decision, the rest of the note which he has written, and the cases to which he refers, are by no means inconsistent with the position laid down by Patteson, J., that the terms of the statute apply to the case of a loan as well as any other transfer of money induced by false pretences. Upon the main question this case is governed by *R. v. Kenrick* and *R. v. Abbott*. There is no distinction between inducing a prosecutor to buy a horse by giving a false account of it, or to buy a cheese, by offering pieces of a superior kind as tasters, and inducing him to advance money upon the security of land by a false representation that a house is built upon it. Here there was a distinct representation to that effect; and *R. v. Codrington* was distinguished by Patteson, J., in *R. v. Crossley*, on the ground that it did not appear that the prisoner did distinctly allege that he had a good title to the estate which he was selling. [PARKE, B.—In *R. v. Codrington*, the question was, as to the admission of the deed in evidence to prove the false pretence. But there the prosecutor

got nothing for his money; here he gets the lease of the land.] In that respect, at all events, that case is overruled in *R. v. Kenrick* and *R. v. Abbott*. The true test cannot be, whether the prosecutor relies exclusively upon the false pretence; it is enough if the false pretence operates to induce him to part with his money.

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[MAULE, J., referred to *Hamilton v. Reginam* (9 Q. B. 271), where the defendant obtained a valuable security, by representing that he was a captain in the fifth regiment of dragoons; and it was held unnecessary to show in the indictment, how the pretence operated.] Here the false statement is continued throughout the transaction; and the circumstance that there was a written contract, and other securities, makes no difference. In *R. v. Adamson* (1 Car. & K. 192, 2 Moo. C. C. 286), the prisoner obtained 200*l.*, by a false representation, that he had been appointed emigration agent at a certain port, and that he would share the salary with the prosecutor; and he was convicted, although, before the prosecutor parted with his money, he was induced to execute a deed of partnership, in which no mention was made of the agency. [MAULE, J.—It may, perhaps, be said, that, in this case, the false representation is only as to the quality of the thing:—as, if upon the sale of a horse, the seller should say that he had won certain races. WIGHTMAN, J.—The cheque was not given until after the mortgage; but he would not have given it for the land only. CROMPTON, J.—It is a misdescription of the estate. You must go the length of saying, that if he had falsely stated that it was well drained, that would be within the statute.] The authorities would support that position.

Bell, in reply.—Suppose the statement were that the chimneys do not smoke, would that be within the statute? [JERVIS, C. J.—The jury must dispose of such questions as that.]

Cur. adv. vult.

JUDGMENT.

JERVIS, C. J., now delivered the judgment of the court. This was a case where a party advanced money upon a representation that a house had been built on part of the property held on mortgage; in fact it was not so, and we are in this case governed by authority, and the conviction will be affirmed.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

May 3, 1856.

(Before JERVIS, C. J., COLERIDGE, CRESSWELL, and ERLE, JJ.
and MARTIN, B.)

REG. v. GARDNER. (a)

*False pretences—Personation—Obtaining board and lodging.**A person, who by falsely representing himself to fill a particular character, induces another to enter into a contract with him for board and lodging, and is supplied accordingly with various articles of food, cannot be convicted of obtaining goods by false pretences, the obtaining of the goods being too remotely connected with the false representation.*

WILLIAM GARDNER was tried upon an indictment charging him as follows: that he did on the 13th day of November, 1855, unlawfully, knowingly, and falsely pretend to one Ellen Henrietta Brunsdon, that the name of him the said William Gardner was William Edgar De Lancy, and that he the said William Gardner was paymaster of the ship "The Duke of Wellington," and that the said ship was then lying at Portsmouth (and the said William Gardner being then in a naval officer's uniform), that he the said William Gardner was the son of a half-pay officer who was living at Chelsea, and that his brother was a lieutenant-colonel in the army, by means of which said false pretences the said William Gardner did then and there obtain of and from the said Ellen Henrietta Brunsdon, twenty pounds weight of bread, twelve pounds weight of meat, three pounds weight of butter, one pound weight of cheese, three pounds weight of sugar, six quarts of beer, and ten quarts of coffee, and other articles of food, together of the value of 30s. of the goods and chattels of the said Ellen Henrietta Brunsdon, with intent then and there to cheat and defraud. Whereas, in truth and in fact, the name of the said William Gardner was not William Edgar De Lancy. And whereas, in truth and in fact, the said William Gardner was not the paymaster of the said ship called "The Duke of Wellington," nor was the said ship then lying at Portsmouth. And whereas, in truth and in fact, the said William Gardner was not the son of

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

a half-pay officer who was residing at Chelsea, but was the son of one William Gardner a collector of rates at Sheerness. And whereas, in truth and in fact, the said William Gardner had not a brother who was a lieutenant-colonel in the army, against the form of the statute, &c.

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The evidence on the part of the prosecution, so far as is material for the purpose of this case, was that, on the 13th day of November last, the defendant, wearing the dress of a naval officer, engaged a lodging of Ellen Henrietta Brunsdon (the prosecutrix), at the rate of ten shillings per week; that, on the 17th day of November, the defendant expressed himself to (prosecutrix) as being comfortable, and that he should be likely to remain some time, and stated that he was paymaster of "The Duke of Wellington," and his name was De Lancy; that defendant continued as a lodger till the 25th of November, and then expressed a wish to become a boarder; that an arrangement was accordingly entered into that he should become a boarder at a guinea a week; that the prosecutrix supplied the defendant with board, consisting of cooked meat, tea, sugar, bread, butter, cheese, and beer for the six days following, but the defendant did not pay her anything for lodging or board.

Upon the case for the prosecution being closed, it was submitted by counsel for the prisoner that the contract for board was a mere addition to the first contract for lodging, and that what the defendant in fact obtained by the false pretence was an alteration of the first contract, and not "goods" within the meaning of the statute. The chairman overruled the objection, and left the case to the jury, who returned a verdict of guilty.

Counsel for the prisoner then applied to the court to reserve the case for the opinion of the Court of Criminal Appeal upon the objection taken, alleging that a case similar to this was then before the court for decision. The court thereupon postponed passing sentence on the prisoner, but ordered him to be detained in custody.

The opinion of the court is requested whether the objection taken by the prisoner's counsel is valid in law?

This case was argued before the above named judges on Saturday, April 26.

Ribton for the prisoner.—This conviction cannot be sustained. When the false statement was originally made, neither money, chattel or valuable security was obtained by it. The prisoner merely became a lodger in the house; and though, some time afterwards, he agreed to become a boarder also at a guinea a week, and was afterwards, in pursuance of that contract, supplied with food, there is no such connection between the false pretence and the obtaining of the food as will justify a conviction for this offence. It is quite clear that to obtain lodging alone would not be within the statute; and it may be questioned whether, in any case, it would be enough to prove that he obtained board and lodging. It would be difficult to separate the two so as to show

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clearly that the articles of food were obtained by means of the false pretence. But, assuming that that might be done in some cases, it is not done here; and the evidence fails altogether to connect the obtaining of the food with the false pretence. If anything was obtained, it was the contract to supply the food and not the food itself.

Horn, contra.—It is well settled that, though the money or goods be obtained through the medium of a contract, yet, if that contract be part of the fraud, the offence is the same. Thus, where the money was obtained upon the sale of a horse, which the prosecutor was induced to buy by a false pretence, *R. v. Kenrick* (5 Q. B. 49); and, where money was borrowed from the drawer of a bill by the acceptor for the alleged purpose of paying it, and upon a false pretence that he was prepared with the residue, *R. v. Crossley* (2 M. & R. 17); or, where a baker delivered short weight to the poor, and presented tickets as if he had delivered full weight according to his contract, *R. v. Eagleton* (5 Cox Crim. Cas. 559; 24 L. J. M. C. 158), the offenders were all held liable to conviction under this statute. The case of *R. v. Codrington* (1 Car. & P. 661) cannot now be considered law, unless it can be distinguished on the ground that the false pretence was not there distinctly proved. *R. v. Abbott* (2 Cox Crim. Cas. 430; 1 Den. C. C. 273.) Here the false pretence is distinctly proved; and it was continued throughout; so that the prosecutrix acted upon it, and was induced by it to supply the prisoner with board as well as lodging. The articles of food which he obtained were chattels within the meaning of the statute, and it cannot make the slightest difference that the prisoner gained the additional advantage of being lodged at the house where he received the goods. Whether he obtained them by means of the false pretence was a question for the jury; and, they having decided it, there is no ground for disturbing the conviction.

Ribton replied.

Cur. adv. vult.

JUDGMENT.

JERVIS, C. J., now delivered the judgment of the court.—In this case, which was argued before us on Saturday last, the court took time to consider, principally with a view of taking into consideration the cases which we were disposed to look further into before we decided the question. It was an indictment for obtaining goods under false pretences, the circumstances being that the prisoner represented himself to be the paymaster of “The Duke of Wellington,” of the name of De Lancy, under which he made with the prosecutrix a contract for board and lodging at the rate of one guinea a week, and he was lodged and fed as the result of the contract, in consequence of the engagement so entered into upon that which was found to be a false pretence, and the question which was submitted to us was, whether it was a false pretence within the statute; or, rather, whether the conviction was right? That we have considered; and, on consideration, we are of opinion that the conviction was not right, because we think that the

obtaining of the articles, supplied under the contract made by reason of the false pretence, was too remote from the pretence in the particular case to become the subject of an indictment for obtaining those specified goods by false pretences. We, therefore, think the conviction should be reversed.

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Conviction quashed.

COURT OF CRIMINAL APPEAL.

April 26, 1856.

(Before JERVIS, C.J., WIGHTMAN, CRESSWELL, and ERLE, JJ.,
and MARTIN, B.)

REG. v. SLOGGETT. (a)

Evidence—Privilege of witness—Questions tending to criminate—Admissibility of a bankrupt's examination before a commissioner upon the trial of the bankrupt on a criminal charge—Voluntary statement.

A bankrupt was examined before a commissioner under s. 117 of the Bankrupt Act, and asked various questions respecting the writing of a false letter in his father's name for the purpose of getting additional credit from persons with whom he traded. He made no objection to answering the questions on the ground that they tended to criminate him, or on any other ground:

Held, that the examination was not compulsory under the 117th sect. of the Bankrupt Act, as touching the estate or dealings of the bankrupt; and that, as he might have objected to it and did not, it was a voluntary statement, and admissible in evidence against him upon his trial subsequently on the criminal charge of uttering a forged letter.

THE following case was stated by Mr. Serjeant Channell:—
Samuel Thomas Sloggett was convicted before me at the last assizes for the county of Devon, of unlawfully uttering a forged letter, signed "S. F. Sloggett," knowing it to be forged, with intent to obtain certain goods, the property of Sampson Copestake and others; sentence was passed upon the prisoner, that is to say, imprisonment for two calendar months in the gaol of Devonport. He is now in prison. Before any criminal charges were made against him, the prisoner was examined in the Court of Bankruptcy for the Exeter district, under an adjudication in bank-

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ruptcy against the prisoner, on petition of a creditor. He, the prisoner, before such examination, made and signed the declaration required by the 12 & 13 Vict. c. 106, s. 117; see also section 254. The examination was taken down in writing in the presence of the commissioner, and was signed by the prisoner. In the course of the examination, the prisoner was cautioned by the commissioner to speak the truth. In a later stage of the examination, the prisoner was told by the commissioner that he was to consider himself in custody. On the trial of the prisoner, the usher of the Court of Bankruptcy was examined as a witness for the prosecution. He produced the proceedings in bankruptcy, and the examination of the prisoner, under the seal of the court and signed by the commissioner. He, witness, proved that he was present when the prisoner was examined before the commissioner, and that he could point out in the examination the part at which the prisoner was told to consider himself in custody. It did not appear that the prisoner claimed the protection of the commissioner, or objected to answer any question on the ground that the answer thereto would criminate or might tend to criminate him, or on any other ground. The counsel for the prosecution proposed to read so much of the prisoner's examination before the commissioner as preceded the statement that the prisoner was to consider himself in custody, offering to read the whole of the examination, if desired by the prisoner's counsel. The prisoner's counsel objected to the reading of the examination. I received in evidence the part of the examination which preceded the statement referred to. The prisoner's counsel did not require the other part to be read. A copy of so much of the examination as was read is annexed to this case. The parties named in the indictment as Sampson Copestake and others, are parties who traded under the style or firm of Groucock and Co. mentioned in the examination of the prisoner, and are the parties therein referred to. The question for the opinion of the court is, whether the examination read was properly received in evidence. The following is a copy of the part of the prisoner's examination referred to in the case.

The Bankrupt Law Consolidation Act, 1849.

In the Court of Bankruptcy for the Exeter District.

Hall of Commerce, Plymouth, July 9, 1855.

In the matter of Samuel Thomas Sloggett, a bankrupt before Mr. Commissioner Bere.

The said S. T. Sloggett being come before the said commissioner on the day and year above mentioned; and having made and subscribed the declaration by law required, and being examined, saith, "the account now produced, marked with the letter A. contains a statement of all transactions I have had with Messrs. Groucock and Co. of London, except the first, for which I paid cash. In August last I had an interview with Mr. Hughes, their traveller, and he asked me what capital I had in my business, and

him from about 250*l.* to 300*l.* He asked me to whom I could
 him to satisfy him. I hesitated, and told him I could not tell
 him to refer him to, but said he could go to my friends. I
 my father. He took my father's address, and put it down.
 was shown a letter written by Messrs. Groucock, of which the
 roduced is as near as I can recollect the substance. The letter
 nt to my father the 24th August. The letter was brought
 by my youngest sister, and I was asked what reply was to
 de to it; and I went home to my father's on the Sunday
 ng the receipt of the letter, and saw my father. I asked
 her to reply to it, stating that he knew as well as I did how
 circumstanced. My father refused to reply to it as I wished,
 e he said the money was not my own capital, and was
 ed. My sister was present at the interview. The reply
 rwarded and written by my brother, Richard Sloggett, on
 th of August. The letter now produced, marked E, is that
 he wrote, the whole is his handwriting, including the address.
 tter was written in an office belonging to my brother, and was
 thorized by my father, who did not know of its being
 1. I did not prepare the draft of the letter. My brother,
 d, wrote it himself, merely asking me what to say. The
 was not my own property. My brother knew that the
 had been lent to me by Mrs. Warburton.

Question.—What object had you in view when you gave
 . Groucock and Co. that statement in the letter, knowing
 was false,—was it not to obtain additional credit?

wer.—No. I had no such object.

Question.—Do you adhere to that answer?

wer.—My object was to gain credit to a certain extent;
 was not aware that the difference between stating the capital
 own and being borrowed would affect my credit.

Question.—Do you adhere to that answer?

wer.—Yes.

Question.—Again you are asked if you adhere to that
 ?

wer.—Yes.

Question.—Why did you not then make a true statement,
 of a false one?

wer.—I anticipated one day the sum would be mine, and I
 t it was a form of theirs to obtain a reference.

Question.—Why did you practice such a fraud by getting
 rother to write in your father's name?

wer.—I was not aware that it was a fraud.

Question.—What has become of the letter sent by Messrs.
 ck and Co. to your father?

wer.—I do not know. I have never seen it since my brother
 he reply to it. I believe it has been destroyed.

Question.—Did you never promise your brother Richard to
 right with your father if he would write it?

wer.—I never said so.

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9th Question.—Did you promise your brother to take it to your father for his approval?

Answer.—I did, and took it to my father accordingly.

10th Question.—Did he caution you against sending it?

Answer.—No; I believe not.

11th Question.—Did you tell your brother that your father had refused?

Answer.—I did before he replied to it; he asked me the nature of it, and I told him.

(See *R. v. Wheeler*, 2 Moo. C. C. 45; 2 Lewin C. C. 157; *R. v. Garbett*, 2 Cox Crim. Cas. 448; 1 Den. C. C. 236; 2 Car. & Kir. 474; cases collected in Taylor on Evidence, 2nd edit., Vol. I. 273, s. 821.)

Collier, for the prisoner. This conviction cannot be sustained, because it is founded upon improper evidence. The bankrupt's examination was inadmissible in evidence against him, because it was taken under section 117 of the Bankrupt Act (12 & 13 Vict. c. 106), and was compulsory upon the bankrupt. He was being examined touching his estate and effects, and had made the statutory declaration "that he would make true answer to all such questions as might be proposed to him respecting all his property and all dealings and transactions relating thereto, and would make a full and true disclosure of all that had been done with the said property to the best of his knowledge, information and belief." He was, therefore, bound to answer, and might have been committed by the commissioner for not answering. He had not the ordinary privilege of a witness, who may, at any stage of the examination, claim the protection of the court, and refuse to answer questions on the ground that they would tend to criminate him: (*R. v. Garbett*, 2 Cox Crim. Cas. 448; 1 Den. C. C. 237.)

COLERIDGE, J.—If he claims the same protection before a bankruptcy commissioner, and was nevertheless committed for not answering, could he not obtain his discharge by writ of *habeas corpus*?

JERVIS, C. J.—The courts, I believe, are not agreed upon that matter. The Court of Exchequer would not discharge him, but the other courts would.

Collier.—It is quite clear that so far as the questions relate to his "trade dealings and estate," he must answer whatever the consequences. The law is so laid down by Lord Eldon, in *Ex parte Cossens*, Buck, 531; adopted by Lord Lyndhurst in *Ex parte Kirby*, 1 Mont. & McAr. 212; and by Sir John Cross, in *Ex parte Heath*, 2 Dea. & C. 216; *Cates v. Hardacre*, 3 Taunt. 424, is an authority to the same effect; and *R. v. Wheeler* (2 Moo. C. C. 45) is distinguishable, because there the witness was cautioned, and allowed to elect what questions he would answer. Then, even supposing that the bankrupt might stop the inquiry as soon as it extended beyond the subject of his "trade dealings and estate," the privilege would be practically useless, if the bankrupt is required to distinguish between questions which do and those which do not relate to his "trade dealings and estate." The inquiry itself is one of the

widest and most undefined description; and to hold that the bankrupt is not protected, unless he claims the protection at the proper moment, is, in effect, to deprive him of all protection. The only reasonable alternative is to consider the whole examination compulsory (as practically it is), and upon that ground to exclude it altogether.

CRESSWELL, J.—I am not aware of any authority which entitles the commissioners in bankruptcy to disregard the general rules of evidence, for the cases of *Ex parte Cossens* and *Ex parte Kirby* do not go that length. They merely show that a bankrupt is bound to disclose what property he has.

Collier.—In the present case, at all events, that portion of the examination which was read in evidence, related so closely to the investigation concerning the trade dealings and estate of the bankrupt that he could not have escaped answering. If he had objected to answer on the ground that the questions were criminatory, he would have been told at once that he was bound to answer, because they related to those matters into which the commissioner has a compulsory power of investigation.

ERLE, J.—The questions seem to have been put, not with a view to disclosure of estate, but with reference to the bankrupt's certificate, the object being to ascertain whether he had resorted to improper means of obtaining credit.

Collier.—There is no reason to doubt that if he had refused to answer, and been committed by the commissioner, as he probably would have been, that commitment would have been upheld. Under such circumstances, the bankrupt's statement cannot be considered voluntary; and not being voluntary, it is excluded by the established rules of evidence.

Coleridge, *contrá*.—This examination was admissible. It was a voluntary statement made by the prisoner upon oath, in the course of a judicial investigation; and it has been often held that a statement is not less voluntary because made by a witness in a court of justice. The reason is, that the witness is privileged to refuse an answer to any question which may criminate him; but he must claim the privilege in order to have the benefit. The question was much discussed in *R. v. Garbett*, and there it was held by a majority of the judges, that the witness did not lose his privilege by answering some questions without objection; but that he might, at any part of the examination, refuse to answer, and if after that he was compelled to answer, the statement made by him would not be voluntary, and consequently could not afterwards be used in evidence against him. If, however, he makes no objection, and elects to answer, he cannot afterwards deny that the statement was voluntary, so as to exclude it as evidence upon his subsequent trial. This is the general rule of law, and it applies to the examination of a bankrupt by commissioners as well as to the examination of a witness at *Nisi Prius*, except that the bankrupt must disclose his estate. That is essential to the bankruptcy proceedings, but beyond mere disclosure of estate he has the same

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privilege as any other witness. The provisions of the Bankrupt Act (ss. 117, 254) are quite consistent with the observance of that privilege, and Lord Eldon, in *Ex parte Cossens*, expressly recognises it. With the exception of disclosure of estate, he says, "that if a man has gone on answering questions that had a tendency to criminate himself, he may stay in answering those questions whenever he pleases. You cannot carry him further than he chooses voluntarily to go himself." Nor are the cases of *Ex parte Kirby*, or *Ex parte Heath*, or *R. v. Wheeler*, at all at variance with that position. In the two former, the questions were connected with disclosure of estate, and the distinction between the examination of a bankrupt and that of any other witness was really confined to such questions. The latter case, of *R. v. Wheeler*, is certainly no authority for saying that in every case the bankrupt's examination is inadmissible, unless he has been cautioned and permitted to elect what questions he would answer. There the course taken is explained by the circumstance that the bankrupt was already under charge of an offence. (He also mentioned a case decided by Crowder, J., on the western circuit during the last assizes, as being expressly in point as to the admissibility of this examination.)

Collier was heard in reply.

JERVIS, C. J.—I am of opinion that the evidence was properly received, and that the conviction is right. This case does not raise the general question which is raised in some of the cases now before this court, (b) and as that question is not open to us at present, I abstain from comments upon the decisions which have been cited and discussed in the course of the argument; but it seems to me that the admissibility of the examination cannot be held to depend, as Mr. Collier suggests, upon whether the bankrupt was able to distinguish between questions which did and those which did not relate to his estate. The true question is whether the examination does so relate to his estate as to preclude him from objecting; because, if he might have objected to the questions put to him and did not, his statement was voluntary and admissible in evidence against him; and it seems to me that he might, inasmuch as the questions did not relate to his estate dealings or effects. The conviction therefore is right.

COLERIDGE, J., concurred.

CRESSWELL, J.—If it had been necessary for the decision of this case, I should have desired more time to consider the real effect of Lord Lyndhurst's decision in *Ex parte Kirby*; but it is not necessary, because in this case, at all events, it seems to me that the general rule of law applies. To a certain extent the 117th section of the Bankrupt Act has taken away from a bankrupt, under examination before a commissioner, the ordinary privilege of a witness—that of refusing to answer questions which might tend

(b) In *R. v. Cross*, the question as to the admissibility of a bankrupt's examination touching his estate, was subsequently argued, but no judgment has yet been given; and another case, not argued, awaits the decision of *R. v. Cross*.

to criminate; but in my opinion the examination in question was not within the exception created by the statute. It did not relate to the estate and dealings of the bankrupt, and, notwithstanding section 117, he might lawfully have objected to answer. His not doing so renders the examination voluntary and admissible.

ERLE, J., and MARTIN, B., concurred.

Conviction affirmed.

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COURT OF CRIMINAL APPEAL.

(Before MONAHAN, C. J., PENNEFATHER, B., BALL and
PERRIN, JJ., and GREENE, B.)

REG. v. WILLIAM MEHEGAN. (a)

Assault—Attempt to have connection with girl between ten and twelve years of age—Consent.

If the jury find that the prosecutrix was a consenting party to indecent liberties taken by the prisoner he cannot be convicted of an assault.

The prisoner was indicted for assaulting and attempting to have carnal knowledge of a girl between the ages of ten and twelve years. When the case for the Crown closed, counsel for the prisoner called upon the judge to leave a question to the jury as to the prosecutrix consenting to the acts complained of, to tell them, if they thought she had consented, to acquit the prisoner, which his Lordship declined to do, but told the jury that if they believed the evidence for the prosecution they should convict the prisoner.

Held, a misdirection, and that the prisoner who had been convicted should be discharged, and the conviction quashed.

THE following case was stated by Mr. Justice Perrin:—

At the assizes held for the county of Cork, in the Spring of 1855, William Mehegan was indicted before me, for that he, on the 28th day of January, 1855, at Kilmoney, did assault and unlawfully attempt to carnally know and abuse Margaret Corcoran, a girl above the age of ten years and under the age of twelve years, to wit, ten years and six months, against peace and statute.

To support this indictment the following evidence was adduced by the counsel for the Crown.

(a) Reported by P. J. M'KENNA, Esq., Barrister-at-Law.

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First witness, Margaret Corcoran.—On the 28th day of January was near Tom Barry's Cross after nine at night. I saw the prisoner, asked him for a halfpenny, and he said if I would go down to the field he would give me sixpence. He gave me a halfpenny. I asked for another, and said if he gave it I would go down. He gave it and took me off the ditch to James Barry's field; he stretched back himself and told me to sit on his knee. I said, Bill Mehegan, let me alone till I go home; he said, Hush, hush, don't be calling any name at all. He let me go, when Mrs. Barry and Ellen Moore came out, and ran away. In the field he had my clothes up, and his trowsers opened; his private parts touched me under my clothes; he had hold of my arm.

Cross-examined.—Mrs. Barry and the other girl came out, and he ran off one way and I another. I was sitting on his knee; he did not carry me.

Second witness, Ellen Moore.—Saw prisoner and first witness together; heard her say give it me and I'll go. They went over the ditch. He had no hold of her. I went to Mrs. Barry and told her, and then to my aunt, and saw them come out of the field.

Third witness, Ann Corcoran.—Margaret is above ten, near eleven years. She went out after nine o'clock. Came in frightened and her eyes glistened.

Fourth witness, Eliza Barry.—I went into the back yard immediately on Miss Moore's statement, and saw a man and a little girl. I called out who is there; they went on, the girl to the road, and the other to the river.

Case for the prosecution closed.

Mr. *Exham*, counsel for the prisoner, then called upon me to leave it to the jury whether or not the girl consented to the acts of the prisoner, as detailed in the evidence, and that, if the jury found that the girl was a consenting party, that he could not be found guilty of the assault charged by reason of such assault.

I declined to do so, and told the jury that, if they believed the evidence, they should find the prisoner guilty, reserving however the question of law for the opinion of your lordships, according to the provisions of the statute 11 & 12 Vict. c. 78.

Cases cited for the prisoner were *Reg. v. Meredith*, 8 C. & Pay. 589; *Reg. v. Martin*, 2 Wood's C. C. 123; 9 C. & Pay. 213; *Reg. v. Kead*, 2 C. & Kir. 957.

L. PERRIN.

The court was of opinion that the conviction was bad, and should be quashed. Counsel for the Crown, *J. R. Corballis*, Q.C. For the prisoner *W. Exham*. (b)

(b) The court sat unexpectedly at a late hour, and I am, therefore, unable to give more than the case stated, and the result.—REPORTER.

Ireland.

COURT OF CRIMINAL APPEAL.

February 23, 1856.

(Before LEFROY, C.J., MONAHAN, C.J., TORRENS, BALL,
PERRIN and JACKSON, JJ., and PENNEFATHER, B.)

REG. v. MARY SHEA. (a)

Larceny—Lost notes—Finder keeping—Felonious intent.

In order to make the detention of lost notes by a finder larceny, it is necessary that at the time at which he first took the notes he should have the intention of appropriating, knowing, or having reason to know, who was the owner.

Where, from the manner in which the question has been left to the jury, it is possible that they may have convicted the prisoner, believing that an after knowledge of the ownership of the notes, and a subsequent detention and appropriation, would justify them in finding the prisoner guilty of larceny, a conviction will be quashed.

Upon the trial of the prisoner for larceny of bank notes, it appeared that the prosecutor had dropped the notes on a public road, and did not miss them for some time. There were no marks which would give a clue to the ownership. Some time after the prosecutor went to the prisoner's house, stating that he had lost notes on the road in question, and calling upon her to give them up, which she refused, saying she knew nothing of them. On a subsequent occasion, and after an interval of about twelve months, a search was made, and several of the notes were found with the prisoner. The judge in charging told the jury that, if she took the notes and kept them, knowing who was the owner, with the intention of appropriating, they should convict her.

Held, wrong in not confining the attention of the jury to the precise time at which the notes were first taken up.

Semble, that cases which tend to convert the ground of a civil action into a criminal offence are to be followed with caution, and that the older authorities on the law of larceny should be strictly followed.—Per Lefroy, C. J.

THE following case was stated for the opinion of the court by Mr. Justice Perrin :—

The prisoner was indicted in one count for the larceny of 100

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one-pound notes, the property of one — Butler, and in a second count for receiving the same knowing them to have been stolen.

It appeared in evidence that the prosecutor, in October 1851, received a large sum of money, 100*l.*, in one-pound notes from Mr. Magrath, the manager of the Bank. Was going to Killarney about the 6th of November, 1851. The money dropped out of his pocket between Cahirciveen and Killorglin. The notes were made up in a book as they came from the Bank, the first being numbered 80,701, and the last 80,800. In a week or fortnight afterwards, in consequence of information Butler received, he went to the house of the prisoner, and telling her of his loss asked her if she had the money, but she denied all knowledge of it. He offered her 10*l.*, and on a subsequent occasion 20*l.*, but she persevered in her denial. He asked her why she had gone off the road across the bog, and she replied that she had lost her road. Butler gave notice to the Bank to stop the notes, and advertised the loss of them.

In consequence of information received, a constable, on the 18th day of July, 1855, went with a search warrant to the prisoner's house. He asked the prisoner if she had any money, she replied she had, and gave him 5*l.* not being any of the lost notes. While making the search, the constable observed her endeavouring to secrete on her person a small bundle, which, after some resistance on her part, he took from her by force, and it was found to contain fifteen one-pound notes, one of which, being numbered 80,800, was identified by the prosecutor as one of the notes lost by him, the other bore numbers between 80,701 and 80,800.

His lordship directed an acquittal on the count for receiving, and as to the count for larceny told the jury that there was no evidence of the prisoner having actually stolen the notes, but that if the jury believed that the prisoner had found the notes and that she, knowing who was the owner, had retained them with the intent of appropriating them to her own use, and had endeavoured to conceal them for the purpose of preventing the owner from recovering possession of them, the jury would be justified in convicting the prisoner of the larceny.

The jury found the prisoner guilty of the larceny and acquitted her on the other count. His lordship reserved for the court the question as to whether his lordship's direction to the jury as to the count for larceny was correct in point of law.

Edward Sullivan (for the prisoner).—The direction of the judge in this case was wrong in point of law. It does not appear from the case that the prisoner knew the prosecutor to be the owner of the notes, or saw him use them, that is, knew at the time when she must have taken the notes. The first knowledge she had of this fact was the prosecutor informing her he had lost the notes, and taxing her with having taken them. If at the time a person takes up notes without knowing to whom they belong, and has an intention of appropriating them, that is not larceny. In *Thistle's case*, 3 Cox Crim. Cas. 573, it was held, that if A. find the chattel of

r, and instantly appropriate it *animo furandi*, that is, with intent of usurping the entire dominion over it, but under such circumstances as to warrant a jury in finding that, at the time of appropriation, he really believed that the owner could neither find the chattel nor be found himself, such appropriation is not larceny. That case was almost identical with the present. The jury in that case found the note which had been accidentally dropped on the high road, there was nothing to show who was the owner, he meant to appropriate it to his own use when he took it.

Before he disposed of it he learned who the owner was, nevertheless, changed it and appropriated it to his own use. The jury found that the prisoner had reason to believe it to be the owner's property before he changed it. A verdict of guilty was returned under the circumstances, but upon conferring with his lordship, Baron Parke, who tried the case, was of opinion that the original taking was not felonious, and therefore reserved the case for the purpose of taking the opinion of the judges, who thought the conviction was wrong. *Reg. v. Dixon* (25 Law J. Mag. 1) is also an authority bearing directly on this point. It was held, that if a man find lost property and keep it, and at the time of finding it have no means of discovering the owner, he is guilty of larceny, because he afterwards has means of finding and retains the property. From the observation of the law in that case, it appears that the fact of one who finds, not upon inquiry, will not make his keeping the article found larceny. Baron Parke says in that case is very applicable to the present case: "There is nothing in this case but that the notes were found and the prisoner has taken possession of them, and kept them. He had seen them drop from the prosecutor, or if they had been named upon them, or there had been something of that nature to enable the prisoner to know who the owner was at the time that he picked up the notes, it would have been a different case. These notes were a waif or stray as spoken of by Baron Parke in his judgment in *Thistle's case*, and there is no evidence of appropriation by the prisoner against the will of the prosecutor. In these cases the question seems to have been, was there at the time the money was taken up an *animus furandi*; now, from the facts which the jury here, they might find the prisoner guilty under a state of facts which show that she was really not guilty, namely, an innocent taking up, and afterwards a guilty determination to keep and retain it.

ALLIS, Q. C.—I admit that if a man takes up a note which he finds, without any felonious intent, and afterwards comes to a determination to appropriate it *animo furandi*, that will not constitute larceny.

WILKINSON, J.—If the issue had been, did the prisoner take these notes at the time she took them knowing who the owner was, it would have been all right.

ABRAMS, C. J.—The question was left to the jury thus: "If

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the jury believed that the prisoner had found the notes, and that she, knowing who was the owner, retained them with the intent of appropriating them to her own use, and had endeavoured to conceal them for the purpose of preventing the owner from recovering possession of them, they should find her guilty." It does not say, *then knowing*. The jury may have taken the direction to mean, that if she discovered the owner four or five years afterwards, and then determined to appropriate with this knowledge, she would have been guilty of larceny.

Corballis, Q. C.—When the constable went to her house to search she did not deny all knowledge of the transaction or of the ownership. He asked her why she had gone off the road and run across the bog, and she said she had lost her road.

PERRIN, J.—There was no evidence explaining these remarks.

MONAHAN, C. J.—If his lordship had told the jury that if she found the notes on the road, and had run off to escape from the owner, they might find her guilty, it would have been correct.

PERRIN, J.—The direction was wrong in not confining the jury to the particular time at which the notes were taken up.

LEFROY, C. J.—The dicta, that there is a duty cast upon persons finding property to search for the owner, and that if they do not they are guilty of larceny, are overruled, and properly so. The old law upon this subject, as it is laid down in Hale and Hawkins, is completely restored and recognised. The case of *Reg. v. West* (1 Denison, C. C. 387), does not affect the other authorities cited, but rather strengthens them, as the court were of opinion that the purse, the subject of the indictment, was not lost at all, and therefore the prisoner was properly convicted of larceny.

Conviction quashed.

Ireland.

COURT OF QUEEN'S BENCH.

May 31, 1856.

Before LEFROY, C. J., CRAMPTON, PERRIN, and MOORE, JJ.)

THE QUEEN IN ERROR v. EVANS. (a)

*Error—Inconsistent verdict—Venire de novo.**Where a verdict is inconsistent, the court will award a venire de novo.**The prisoner was indicted for stealing three sheep, the property of E. J.**There was a count charging him with receiving the same goods on the same day. The finding of the jury as entered on the record was, that the prisoner was "guilty of the premises on the said indictment above specified:"**held, that although such finding amounted to a finding of guilty on each count, yet as it was impossible that the prisoner could have been guilty of both offences, under the circumstances the Crown should not be at liberty to enter a nolle prosequi on one count, and move for sentence on the other, but that a venire de novo should be awarded.*

THIS was a writ of error brought by the Crown for the purpose of quashing an illegal sentence of transportation and having the proper sentence pronounced, under the 11 & 12 Vict. c. 78, § 5. On the case coming before the court, Mr. Justice Perrin referred to the difficulty raised by the form in which the verdict was entered, and the prisoner being unable to retain counsel.

Mr. Morris was assigned by the court as counsel for the prisoner. The following was the indictment and assignment of errors:—

County of Kerry, } The jurors of our Lady the Queen upon
to wit. } their oath present, that David Evans, on the
5th day of December, 1855, at Knuckynoe, feloniously did steal,
take, and drive away three sheep, of the property, goods, and
chattels of Ellen Shine, against the form of the statute in such
case made and provided.

And the jurors aforesaid, upon their oath aforesaid, do further present that David Evans, on the day and year aforesaid, feloniously did receive the said three sheep so as aforesaid feloniously stolen, taken, and driven away at the time when he so received the said property, goods, and chattels of the said Ellen Shine, then

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well knowing the same to have been feloniously stolen, taken, and carried away against the form of the statute in such case made and provided. And afterwards, to wit, at the same General Quarter Sessions of the Peace of our said Lady Victoria the Queen, holden at Tralee, on the said 2nd day of January, in the year of our Lord aforesaid, before the said William M'Dermott and the said justices of our said Lady Victoria the Queen above named, and others their fellows aforesaid, came the said David Evans, in his own proper person, under the custody of Robert Conway Hickson, high sheriff of the said county, to whose custody the said David Evans was before that time committed, and being brought to the bar of the court here in his proper person, is committed by the court here to the custody of the said sheriff, and having heard the said indictment read, and forthwith demanded of and concerning the premises in the indictment aforesaid, how he would acquit himself thereof, the said David Evans says he is not guilty thereof, and of and concerning the premises therein contained, and for good and for ill he puts himself on the country, and the Right Honourable William Keogh, being then and there Attorney-General for our said Lady the Queen, who prosecutes for our said Lady the Queen, in his behalf doth the like, therefore by the consent of the said David Evans, let a jury thereupon come immediately before the said William M'Dermott and the justices of our said Lady the Queen above named, and others their fellows aforesaid here, by whom the matter may be better known, and who are not akin to the said David Evans, to inquire upon their oaths whether the said David Evans be guilty of the premises in the said indictment or any part thereof above specified aforesaid or not, because as well the said William Keogh, Attorney-General for our said Lady the Queen, who prosecutes for our said Lady Victoria the Queen in this behalf as aforesaid, as the said David Evans has put himself on that issue, and the jurors of the jury aforesaid, impanelled and returned for this purpose by the said sheriff of the county aforesaid (setting out their names), being called came, who being duly sworn, tried, and chosen to speak the truth of and concerning the premises in the said indictment above specified and every part thereof, do say upon their oath, *that the said David Evans is guilty of the premises in the said indictment above specified, in manner and form as by the said indictment and the premises therein contained above against him is alleged, and that the said David Evans, as to the premises in the said indictment above specified and every part thereof, did commit the felony upon that occasion, whereupon all and singular the premises being now here seen and fully understood by the said William M'Dermott and the said justices and their fellows assigned to keep the peace of our said Lady Victoria as aforesaid, and here assembled at the said General Quarter Sessions of the peace aforesaid.*

It is ordered and adjudged by the said William M'Dermott and the said justices and their fellows, that the said David Evans as to the premises contained in the aforesaid indictment and every part

thereof above specified, and whereupon it is considered by the court here that the said David Evans be transported immediately, or as soon as conveniently may be, beyond the seas for the term of seven years to be computed from the time of his conviction.

The *Solicitor-General* (with whom *Corballis*, Q. C.), for the Crown.—The illegal sentence is to be put entirely out of consideration; it is erroneous, and the case is to be treated as if there had been no sentence on the record. Under these circumstances the court may either pronounce the proper sentence or send the case back to the court below to pass the proper sentence. We understand that the difficulty in the mind of the court arises from there being two inconsistent counts, and a general verdict which does not say on which count the prisoner has been found guilty. After verdict you are to consider this finding as a conviction for two distinct felonies. [PERRIN, J.—Then, if so, we are to pronounce two sentences.] *Campbell v. The Queen* (11 Q. B. 799, and 2 Cox Crim. Cas. 463) shows merely that felony is not *nomen collectivum*, and that a finding of guilty of the felony aforesaid, when there were two counts, each involving a different punishment, is bad for uncertainty. We are relieved from that difficulty here, because we have words which amount to a finding of guilty on both counts; namely, “that the said David Evans is guilty of the *premises* in the said indictment above specified, in manner and form as by the said indictment and the premises in the said indictment above specified and every part thereof.” In *Campbell v. The Queen*, an indictment at Quarter Sessions charged prisoners, in the first count, with stealing in the dwelling-house of A. the money and goods of A. above the value of 5*l.*; in the second count, with simple larceny of money and goods of the said A., describing them as in the first count. The jury found the prisoners guilty of the felony aforesaid as by the indictment aforesaid supposed. Judgment, that the prisoners respectively should be transported for ten years. Error was first assigned in the Queen’s Bench, and it was there held that an indictment containing several counts is bad in arrest of judgment, and on error for duplicity, *if it necessarily appear that two or more counts are for the same offence*, but that this did not necessarily appear on the indictment; that the word “felony” was not *nomen collectivum*; that the verdict was bad for uncertainty, in not specifying the offence of which it found the prisoners guilty; and that the judgment was erroneous, the court not being at liberty to apply the verdict to the first count only. Now here the two counts are so inconsistent that they must be taken to be different offences, and the court is to treat the record exactly as if there was a separate finding of guilty upon each count. [LEFROY, C. J.—In the present case, is there any ground for arguing that the two counts were for different offences? The second count charges with feloniously receiving the said three sheep so as aforesaid feloniously stolen.] In *Campbell v. The Queen* it equally appeared the same goods in both counts, as the second count charged with larceny of

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the goods and chattels of A., describing them precisely as in the first count. In giving judgment in that case in the Exchequer Chamber, Parke, B., says: "We have had some doubt whether the original judgment of the Court of Quarter Sessions was wrong, and whether that judgment ought not simply to have been affirmed, on the ground that the term 'felony' was *nomen collectivum* as well as the term 'misdemeanor,' and that both the counts being good, and both found to be true, the case fell within the principle of the decision of *Rex v. Powell*, which was certainly not expressly overruled by the decision of the House of Lords in *O'Connell v. The Queen* which proceeded mainly on the ground that judgment was given, in part at least, on a bad count." The fair deduction from that observation is, that if relieved of that difficulty about the word "felony," and having nothing further to embarrass them, they would have upheld the judgment of the court below. Under the circumstances of the present case, *The King v. Powell* (2 Barn. & Ad. 75) is an authority for the court pronouncing judgment on this record. There the indictment charged, firstly, an assault with intent to ravish; and, secondly, a common assault. The jury found the defendant guilty of the misdemeanor and offence in the indictment specified, and the court sentenced the prisoner to two years' imprisonment with hard labour. It was held, on a writ of error, that the word "misdemeanor" was *nomen collectivum*; that the finding of the jury was, in effect, a finding of guilty of the whole matter charged in the indictment. The record here shows that, as to the premises and every part thereof, the jury thought the prisoner guilty. That means guilty of both the felonies charged. We have two distinct counts, both good, and a verdict on both; and, on the authority of *Campbell v. The Queen* you may pronounce sentence on either of the counts. The Crown may enter a *nolle prosequi* on one of the counts. In the case of *Reg. v. Rowlands* (2 Den. C. C. 364), on the recommendation of the court, a *nolle prosequi* was entered on three counts after verdict. [MOORE, J.—How do you get over this difficulty, that there has been judgment in this case?] The court having pronounced the judgment illegal, it is removed entirely, and we are to treat the case as if there had been nothing further than the verdict in the case. In *Holloway v. The Queen* (17 Q. B. 317), it was held, amongst other things, that, supposing several counts of an indictment to aver substantially the same facts, without distinguishing one narrative from another by the term "afterwards" or any similar expression, the indictment was not bad for duplicity, as the court would not assume that the same offence was repeatedly charged, and also that if any one count of the indictment was good, the court might, under the statute 11 & 12 Vict. c. 78, s. 5, pronounce judgment, or direct the sessions to pronounce it, on the good count. In giving judgment in *O'Connell v. The Queen* (11 Clarke & Finn. 415.), Lord Campbell says, "It is an utter mistake to suppose that there is only one *corpus delicti*, which is made the subject of several counts in one indictment. Even with respect to felony, the law

es a separate offence to be charged in each count." If the should be against me on the first branch of my argument, the that remains is that taken in *Campbell v. The Queen*—send the case to the court below, and award a *venire de novo*. Upon int, as to awarding a *venire*, he cited *Huggins'* case: (1 ymond, 138; *The King v. Edmonds*, 4 Bar. & Ald. 471.) has been a mistrial here, and therefore the court should a *venire de novo*.

ris, for the prisoner.—In such a case as this, if it had not or the 11 & 12 Vict. c. 46, s. 3, the prosecutor would have out to his election: (*Rex v. Gough and others*, 1 Moody and on, 71.) It is impossible that the prisoner could have stolen goods and also received them. In *Reg. v. Perkins* (2 Den. 159) it was held, that a principal, in the second degree *ps criminis*, cannot at the same time be treated as a receiver. ust assume that this indictment was under the statute .2 Vict. c. 46, and if it were, it was the duty of the jury a found a verdict of guilty upon one count only. The words third section of the act are, "In every indictment for usly stealing property it shall be lawful to add a count for usly receiving the same property knowing it to have been and in any indictment for feloniously receiving property ng it to have been stolen, it shall be lawful to add a count oniously stealing the same property; and where any such aent shall have been preferred and found against any person, secutor shall not be put to his election, but it shall be lawful a jury who shall try the same to find a verdict of guilty, of stealing the property or of reciving it knowing it to have tolen." The fifth section of the act (11 & 12 Vict. c. 78), constitutes the Court of Criminal Appeal, empowers the court othing more with this record than revise the illegal judgment may have been brought before them on a writ or error. It es, "that whenever any writ of error shall be brought upon dgment on any indictment, information, presentment, or tion on any criminal case, and the Court of Error shall e the judgment, it shall be competent for such Court of either to pronounce the proper judgment or to remit the to the court below, in order that such court may pronounce oper judgment upon such indictment, information, present- or inquisition." That act cannot help the Crown in the

The meaning of the statute is, that you are to set right a case where there is nothing wrong but the judgment ad. It was to provide for a case in which all the proceedings ormal and correct, except the judgment. Under the circum- s of this case, it would be usurping the province of the jury, uncertain case like this, to select the count upon which the er is to have a verdict entered against him. There cannot award of a *venire de novo* to an inferior court: (*Bishop v. 3 Barn. & Ald. 605*; *Trevor v. Wall*, 1 T. R. 151.) *ballis*, Q. C., in reply, cited *Rex v. Craddock* (4 Cox Crim. 09); *Reg. v. O'Brian* (1 Denis. C. C. 9.)

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JUDGMENT.

LEFROY, C.J., now delivered the judgment of the court.—This case comes before the court on a writ of error, and it must have appeared, in the course of the argument, that the difficulty suggested by my brother Perrin was not without foundation. The more we considered the case, the more we thought it worthy of consideration. The counsel for the Crown have given us all the cases on the subject, and the ability with which Mr. Morris (counsel for the prisoner) grappled with the difficulties in the case has given us great assistance. The writ of error was brought in consequence of a defective sentence of transportation, no longer applicable to the offence. There is no question as to the propriety of setting aside this sentence; the difficulty was as to what should then be done. The difficulty arises on the face of the record, which contains the two counts of the indictment, the verdict, and the state in which the record would then stand, when the judgment and sentence were removed, how was the case to be disposed of? I think we have arrived at a sound conclusion with regard to this difficulty. This appears to have been an indictment containing two counts, one for stealing, and the other for receiving knowing to have been stolen. The count for receiving states explicitly the identity of the property stolen with that which was received. It is expressly stated to be the same property of the same person, stolen and received on the same day. Although it may be possible that a man may have stolen goods, and, after disposing of them, may afterwards get them into his hands knowing them to be stolen, and be thus guilty of stealing and receiving the same goods, the statements in this record negative such a state of facts. The question is, looking at the law as it stands, are we not to assume that this indictment was framed under the statute of the 11 & 12 Vict., which enabled the prosecutor upon one transaction to insert two counts, one for stealing, the other for receiving knowing to be stolen, in order that the difficulty might be avoided which otherwise might arise from the right of the prisoner to put the prosecutor to his election. If previous to, and without the authority of this statute, the prosecutor had inserted two counts, the consequence would be that when put to his election he might make a wrong election, and thus the ends of justice might be defeated. To avoid, therefore, this failure of justice, the act provided that the prosecutor should not be put to his election, and deprived the prisoner of his right to that election, and left it open for the prosecutor to have in the one indictment two distinct offences, namely, the stealing, and receiving knowing to be stolen. But the law to which I have adverted, although it allows the prosecutor to charge both offences, and deprives the prisoner of the right to have an election, so that he may be convicted on whichever count of the indictment the evidence will support, was for the advancement of justice. It places him in a position in which it was right he should be placed; but at the same time that the

did this, it did not intend that he should be tried for, or tried of, two substantive offences; and accordingly it provides the jury shall dispose of the whole indictment, by acquitting the prisoner on one count should they find him guilty on the other, thus absolve him from a general verdict, which, after verdict, is intended as one of guilty of both offences, and subjecting to punishment accordingly. The statute dealt fairly, both as to public justice and the accused person. The prisoner not having a right to put the prosecutor to elect, we are to assume that the indictment was framed under the statute, which entitled the prosecutor to insert two essentially different counts for the same offence. The unity of the offence in the ordinary use of language is beyond a doubt, the stealing and receiving are of the same kind, laid to be the property of the same person, and on the same day, and the jury find him guilty generally. They do not distinguish in their finding one count from another, but find him guilty generally of all the premises. He cannot have been guilty of both the offences charged; it is therefore impossible on that point to ascertain what the jury meant. The record, however, is then dealt with as if there were in it a sufficient certainty to sustain judgment thereon. The sentence of the court below is then set aside on the ground of informality, namely, pronouncing a sentence not warranted by the law; and that being so, the question for this court is, have we the materials for pronouncing another sentence? We have a finding which brings the prisoner before us as a guilty person, although as to the exact nature of that guilt we are quite at a loss to pronounce. We must, therefore, deal with it as a case where there has been a finding on which we could discharge him from one of the counts. The record must therefore be dealt with as if there had been a general verdict, on which the court should find matter which would not justify either an acquittal or conviction. The practice in such a case has been to award a *venire de novo*. The cases in Raymond's reports, and the later cases, sanction such a course, and we cannot see any good grounds for distinguishing an uncertain general verdict, such as this, from an uncertain special verdict. If we set aside the judgment and sentence, and not having the necessary materials to enable us to pronounce sentence, we must set aside the record, in order that there may be a new trial. If there is no objection open to the prisoner, he may take it when he is to be tried, and by the course we take we neither prejudice the course of justice nor deprive the prisoner of any of his rights. We shall therefore set aside the verdict and subsequent proceedings, and award a *venire de novo*, and in making out the writ the officer of the court will follow exactly that made in the case of *Campbell v. The Queen*. (b)

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(b) See 11 Q. B. 814.

CENTRAL CRIMINAL COURT.

DECEMBER SESSION, 1855.

December 19.

(Before ALDERSON, B., and COLERIDGE, J.)

REG. v. DAVISON AND GORDON. (a)

12 & 13 Vict. c. 106, s. 251—*Embezzlement by bankrupt—Evidence—Jurisdiction—Venue.*

Upon the trial of an indictment against bankrupts under the 12 & 13 Vict. c. 106, s. 251, for embezzling part of their personal estate to the value of 10l., to wit, bank notes and moneys, it appeared that the adjudication took place on the 21st June. Four days previously, viz., on the 17th, the bankrupts received several bank notes, and on the same day they crossed over to Belgium, where they remained for a considerable time. Some of these identical notes were afterwards received by mercantile houses in London from places in Belgium, to which the bankrupts were traced, but there was no evidence as to how or where the notes were dealt with by them from the moment of their receiving them. In their possession, when they were apprehended, was found a memorandum-book, purporting to be an account of their expenditure in Belgium, the items being stated in foreign coin. The bankrupts were followed to England, and there arrested, and when before the Bankruptcy Court, they gave no account of the disposal of the notes in question.

Held, that there was no evidence of any offence committed within this realm, for that if the notes were changed in this country, such a disposal must have taken place on the 17th June, and, therefore, before the adjudication, and if disposed of abroad, that, as well as the disposal of the proceeds, was a complete offence there :

Held also, that although a subsequent non-accounting was evidence of a fraudulent appropriation, it was not any part of the crime of embezzlement :

Held also, that on the trial of such an indictment, no inference unfavourable to the defendants ought to be drawn from the fact, that when before the Commissioner of Bankrupts, they refused to be examined on the ground that they might, by their answers, criminate themselves.

Held also, that the word "moneys" in the indictment must be construed to mean English money, and would not include foreign coin.

Held also, that the description of the money embezzled, although laid

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

under a videlicet, was a material averment, and such as the court in its discretion would decline to amend.

Semble, per Alderson, B. The meaning of the words "personal estate to the value of 10l." is 10l. in one sum, and that the disposal of several smaller sums at different times, amounting in the aggregate to a larger sum than 10l., would not be an embezzlement within the statute.

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THE defendants were indicted under the 251st sect. of 12 & 13 Vict. c. 106; for, that they being declared and adjudged bankrupts did, on the 23rd of June, A.D. 1854, feloniously conceal and embezzle a part of their personal estate to the value of 10l., to wit, certain bank notes and certain moneys, with intent to defraud their creditors. It was proved in evidence that the defendants were, on the 21st June, 1854, duly adjudged bankrupts. That, on the 17th of June previous, Gordon received from his clerk, in exchange for a cheque, 500l. in Bank of England notes. He also received, on the same day, a cheque for 2,600l. on the Union Bank of London, which cheque was exchanged at that bank by some one on the same day for several Bank of England notes. It was also proved that some of these notes were, subsequently to the date of the adjudication, sent over from various mercantile houses in different parts of Belgium to other mercantile houses in London; and also that the two defendants had, on the 17th of June, crossed over to Ostend, and were afterwards seen together in various towns in Belgium, some of them being the towns whence the notes had been sent to England. The defendants were followed by an officer through several countries of Europe, until at length, on the 20th of August, 1855, they landed at Southampton, and were taken into custody. On one of them was found a memorandum-book, in which there were entries of trifling sums, in foreign coin, expended from the time of their arrival at Ostend. In the course of the case, it was elicited that the defendant Gordon, when examined before the bankruptcy commissioner, refused to answer any questions, on the ground that, by so doing, he might criminate himself.

ALDERSON, B., was of opinion that it would be wrong for the jury to draw any inference unfavourable to the bankrupt from the fact of his declining to answer the questions put to him. It would be in violation of the privilege possessed by every man to abstain from saying anything that might tend to criminate him.

Ballantine (for the prosecution) contended that, by the terms of the Bankrupt Act, bankrupts were bound, on being examined, faithfully to account; and so strongly did Lord Eldon feel on that subject that he had used this expression, that a bankrupt was bound to answer, even if, in so doing, he was putting a halter about his neck.

ALDERSON, B., still adhered to his former ruling.

At the conclusion of the case, on the part of the prosecution,

Byles, Serjt. (for Davison), submitted that there was no evidence to go to the jury. The first objection was, that no offence

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had been proved to have been committed within the jurisdiction of the court. It was also clear that there could be no offence before the 21st of June, the date of the adjudication, and after that time the defendants were abroad. The words of the act were "If any bankrupt should remove, conceal, or embezzle any part of his personal estate to the value of 10*l.* or upwards," he should be guilty of an offence. The word remove is not in the indictment. There was no evidence to show a concealing, and the whole question was with respect to the word "Embezzle." What was the meaning of that word? Not the same as in the 7 & 8 Geo. 4, c. 29, for if it were so, no one could be guilty unless he were a servant.

ALDERSON, B.—No, that is not so; because "being a servant" is used as well as the word "embezzle."

COLERIDGE, J.—Embezzlement was well known as a law term before that statute was passed.

Byles, Serjt., would assume it to mean the fraudulent appropriation of the money of others to a man's own use. Then, even taking it that one of these bank notes was proved to have been exchanged at Brussels after the 21st of June, that might be embezzlement, but it would be an embezzlement committed abroad, and therefore beyond the jurisdiction of the court. It was said that, if the defendants had sent home a complete account of what they had done, it would not have been an embezzlement, but then it would only come to this, that if they had done something in England which they did not do, there would have been no complete offence. It did not follow there would not be a complete offence independently of such non-accounting.

ALDERSON, B.—If they carried abroad with them the notes on the 17th June, they were not then the property of the assignees. If they changed them after the 21st, the act of embezzlement would be complete. If they exchange the notes on the 28th, for instance, for foreign coin, then the foreign coin also would be the property of the assignees.

Byles, Serjt., would admit that that might be so, but what act had been done here within the jurisdiction of the court? If the notes were exchanged in England, it must have been at a time when the bankrupts could not have committed any offence. If exchanged abroad, the offence was not within the jurisdiction. That was the dilemma in which the prosecution was placed.

Montagu Chambers (for Gordon.)—It had been said by the counsel for the prosecution that the offence of embezzlement was a compound one, and consisted—first, of a misappropriation; secondly, of a non-accounting. But this was a mistake. The offence was complete the very moment there was a misappropriation. No doubt the non-accounting was material evidence to show the fraud.

ALDERSON, B.—It is material to show a non-accounting for this reason: a servant may appropriate a specific sum he receives on account of his master, and discharge himself by paying over

master an equivalent sum in other coin. There the finding is clear evidence to disprove any fraud.

Defendants.—That the non-accounting was not part of the offence pleaded is clear from other portions of the same section of the act, which provided for that very state of things. If he surrendered, or if, on his surrender and examination, he did cover all his estate, &c., he was punishable as for a distinct separate offence from that with which he was now charged, was simply one of embezzlement. Again, the embezzlement must be of something intrusted to him. Suppose the case of a road having been adjudged bankrupt in his absence, and he left it afterwards, but nevertheless spent the money then in session, surely that could not be called embezzlement. He might have been obliged to spend the money to enable him to comply with the act of Parliament itself, in returning to England for the purpose of his surrender.

ERSON, B.—Another question may arise, namely, whether embezzlement must not be to the amount of 10*l.* at one time? If he spends five shillings a day for forty days, I doubt whether it would be an embezzlement within the statute. Twenty pence would not in the olden time make up one grand. The bankrupts do not appear to have spent at any one time a sum approaching 10*l.*

Defendants submitted that if the prosecution relied upon the money, the answer was, that if they were exchanged in England it was before the adjudication; if they were exchanged then the act was not done within the jurisdiction of the court. If they relied, again, on the money, the produce of the sale, there was this further objection, in addition to the preceding, that the money mentioned in the indictment must be taken to be English money, and there was no proof of their possession of the money in English coin.

The *prosecution* contended that there was nothing to show that the money was not English money. The memorandum book summed up the expenditure in francs, but the probability was that the defendants had English money with them for some time after their arrival in Belgium. But the nature of the money was immaterial. Whether it was, it was part of their personal estate, and the court, after using the words of the statute, that they did convert a portion of their personal estate, to the value of 10*l.*, was not under a videlicet to describe what that portion was.

ERSON, B.—If the averment is material, the videlicet does not matter to you.

BRIDGE, J.—You surely cannot contend that upon this indictment you could give evidence of their having embezzled two hundred *l.*

The test of the materiality is this—could you have averred at the words “of the value of 10*l.*” without alleging the nature of the property. If you could not, then the description is immaterial, and as the words in the indictment must be taken to mean English money, you have not proved the allegation as laid.

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Ballantine submitted that at all events the statement might be amended.

ALDERSON, B. (after consulting COLERIDGE J.)—Neither my learned brother nor myself think that the statute allowing amendments applies to such a case as this.

Ballantine then contended that as to the notes it was a question for the jury when they were exchanged; and if any of them were exchanged after the adjudication, the non-accounting for them here, as it was the bankrupt's duty to account, was an offence committed within this realm. Formerly there was no such offence as embezzlement; what now constituted the offence was then a breach of trust, for which the defaulter was not amenable to criminal justice. It could not be a larceny, because the property came into the defaulters' possession lawfully, and there was, therefore, no trespass. Then came the statutes on the subject, which, in effect, made such a fraudulent appropriation a stealing, although there was in fact no trespass. Embezzlements which could only be committed by clerks or servants were then extended to persons standing in other relations—to bankrupts, for instance; but still the offence had all the incidents belonging to the crime as first created. It would be the bankrupt's duty to account to his assignees, precisely as a servant was bound to account to his master, and until he abstained from accounting the offence of embezzlement was not complete. In *R. v. Milner* (2 Car. & Kir. 310) it was held, that the offence of not surrendering to the bankruptcy was completed at the district court where the bankrupt ought to have surrendered.

ALDERSON, B.—That is an act of omission, and can have no other locality except the place where the thing ought to have been done. If the non-accounting in this instance was the offence, no doubt the omission took place in England; but the question is, whether the non-accounting is embezzlement.

Ballantine.—Suppose a servant is sent by his master to a foreign country to collect debts, and he misappropriates the money abroad, and returns here, according to the doctrine now contended for, he could not be tried at all.

COLERIDGE, J.—Suppose a person, after adjudication of bankruptcy against him in London, embezzles in Yorkshire, and does not account in London, could he be tried in this court? He would, no doubt, be triable in Yorkshire, because the offence is committed there.

Ballantine contended that the offence would have been committed in London. The money was, in fact, taken out of the pockets of the assignees in London. In *R. v. Taylor* (R. & R. 68) it was held, that where the money was received in one county, and the receipt denied in another, the venue was well laid in either county. *R. v. Hobson* (R. & R. 56), and *R. v. Murdoch* (2 Den. C. C. 298), were to the same effect.

ALDERSON, B.—Where there is no evidence of fraudulent embezzlement, except the non-accounting, the venue may be laid in

the place where the non-accounting occurred, because the jury may presume that there the fraudulent misappropriation was made, but this cannot apply where there is distinct evidence of the misappropriation elsewhere. In *Hobson's case*, the prisoner denied the receipt of money which he had received and spent. There was no evidence, however, of where the spending took place, and it might, therefore, be presumed to be where the receipt was denied. According to your argument, the offence would be committed at the place where the master was residing at the time when the servant ought to have accounted.

Byles, Serjt., and *Chambers* were not called upon to reply.

ALDERSON, B.—I am of opinion that no offence is proved to have been committed in this country. We have no knowledge of when the notes were changed; that being so, they may have been lawfully changed before the adjudication. But if changed by the defendants at all, there was reasonable evidence to show that they were changed for goods and chattels, that is to say, foreign money, but when that exchange took place there was no evidence before the court to show.

COLERIDGE, J.—I am of the same opinion. If what was proved to have been done abroad had been done in this country, the crime would have been complete at once, and it would not have been necessary for the prosecution to give any evidence of non-accounting. The case would have been perfect without that. The accounting would only have come in on the part of the prisoners as a defence, to show *quo animo* the acts charged against them were done. Independently of that, the acts carried their own intention with them. Where the act is incomplete, or indifferent in itself, it may be necessary afterwards to make up the deficiency by showing a non-accounting, but where the misappropriation is once clearly established, the non-accounting could not in any way strengthen the charge.

ALDERSON, B.—I think it right to add, that in my opinion it is exceedingly doubtful whether spending the money from day to day in small sums, not amounting in any one instance to 10*l.*, could be considered to be within the penal clauses of the section.

Ballantine and *Poland* for the prosecution.

Byles, Serjt., and *Bodkin* for the defendant *Davison*.

Montagu Chambers, Q.C., *Clarkson*, and *Parry* for the defendant *Gordon*.

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COURT OF CRIMINAL APPEAL.

July 2, 1856.

(Before Lord CAMPBELL, C. J., COLERIDGE and WILLES, JJ.,
ALDERSON and BRAMWELL, BB.)

REG. v. BENJAMIN SCOTT. (a)

Evidence—Examination of bankrupt—Answers extracted under threat of committal.

The examination of a bankrupt in the Court of Bankruptcy, touching his trade, dealings and estate, is admissible in evidence against him upon a criminal charge, though the answers may have been extracted from him under threat of committal, and may be criminatory of himself. [COLERIDGE, J. dissentiente.]

BENJAMIN SCOTT, a bankrupt, was tried and convicted before me (WILLES, J.) at the Yorkshire Spring Assizes, 1856, for mutilating one of his trade books, upon the following count:—
“Yorkshire, } The jurors for our Lady the Queen, upon their
to wit. } oath present, that heretofore and after the making
and coming into operation of a certain act of Parliament, made
and passed in a certain session of Parliament, holden in the
12th & 13th years of the reign of her present Majesty, called ‘The
Bankrupt Law Consolidation Act, 1849,’ and before and at the
time of the commission of the offence hereinafter next mentioned,
to wit, on the 23rd day of November, 1855, Benjamin Scott,
hereinafter mentioned, was a trader liable to become bankrupt
within the intent and meaning of the said act, and of the law then
in force relating to bankrupts in England, and that he the said
Benjamin Scott for more than six months next immediately pre-
ceding the time of filing the petition for adjudication of bankruptcy
hereinafter mentioned, in the Court of Bankruptcy for the Leeds
district, did reside and carry on business as such trader as afore-
said, to wit, as a blanket manufacturer, dealer and chapman, at
Earlsheaton, in the county of York, and within the jurisdiction of
the said Court of Bankruptcy for the Leeds district. And the
jurors aforesaid, upon their oath aforesaid, do further present that
the said Benjamin Scott, so being such trader as aforesaid, and

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

whilst he so resided and carried on his said business as such trader as aforesaid, within the jurisdiction of the said Court of Bankruptcy for the Leeds district, afterwards, to wit, on the 23rd of November, 1855, did file with the registrar of the said Court of Bankruptcy for the Leeds district, a declaration in writing in the form specified in schedule D. annexed to the said act, which said declaration in writing was signed by the said Benjamin Scott and attested by an attorney, and by which he did declare to the said Court of Bankruptcy for the Leeds district that he the said Benjamin Scott was then unable to meet his engagements with his creditors. And the jurors aforesaid, upon their oath aforesaid, do further present that the said Benjamin Scott, whilst he so resided and carried on his said business as such trader as aforesaid within the jurisdiction of the said Court of Bankruptcy for the Leeds district, afterwards, to wit, on the said 23rd of November, 1855, and within two months from the filing of the said declaration in writing as aforesaid, did present his petition for adjudication of bankruptcy against himself as such trader as aforesaid to the said Court of Bankruptcy for the Leeds district, and by which said petition he did show to the said Court of Bankruptcy for the Leeds district, that he the said Benjamin Scott, the petitioner, being a trader within the meaning of the law of bankruptcy, and having carried on business for six calendar months next immediately preceding the date of the said petition, within the district of the said Court of Bankruptcy for the Leeds district, and being unable to meet his engagements with his creditors, had filed a declaration of insolvency in manner and form in that case made and provided; and that the said petitioner did verily believe that he could make it appear to the satisfaction of the said Court of Bankruptcy for the Leeds district that his available estate was sufficient to produce the sum of 150*l.*; and, by the same petition, the said petitioner, Benjamin Scott, did pray the said Court of Bankruptcy for the Leeds district that, on proof of the requisites in that behalf, adjudication of bankruptcy might be made against himself, the said Benjamin Scott, the truth of which said petition and the several allegations therein he the said Benjamin Scott, the petitioner, then and there in and before the said Court of Bankruptcy for the Leeds district, verified upon his oath by affidavit in the form specified in schedule N. to the said act annexed, as by the said petition and affidavit filed in the said Court of Bankruptcy for the Leeds district, reference being thereto had, will more fully and at large appear. And the jurors aforesaid, upon their oath aforesaid, do further present that the said Benjamin Scott did commit an act of bankruptcy within the jurisdiction of the said Court of Bankruptcy for the Leeds district at the time of filing the said declaration in writing with the registrar of the said Court of Bankruptcy of the Leeds district, he the said Benjamin Scott having filed his aforesaid petition for adjudication of bankruptcy against himself in the said Court of Bankruptcy for the Leeds district, within two months from the filing of such declaration in writing with the registrar of the said Court of Bankruptcy for the Leeds district as aforesaid. And the

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jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the said 23rd of November, at the parish of Leeds, in the county of York, at a court then and there held of the said Court of Bankruptcy for the Leeds district, by and before Martin John West, Esq., who was then and there acting as a commissioner of the said Court of Bankruptcy for the Leeds district, he the said Martin John West, upon the application of the said Benjamin Scott, so being such trader as aforesaid, and upon proof of the trading and of the filing a declaration of insolvency, and of the sufficiency of his available estate to the extent required by the bankruptcy acts, did then and there duly adjudge the said Benjamin Scott to be bankrupt, according to the form of the said statute in that behalf, and which said adjudication of bankruptcy against the said Benjamin Scott hath not hitherto been annulled, and is now in full force and effect. And the jurors aforesaid, upon their oath aforesaid, do further present that on the day on which the said Benjamin Scott was so adjudged bankrupt as aforesaid, by the said Court of Bankruptcy for the Leeds district, to wit, on the said 23rd of November, 1855, he the said Benjamin Scott did then and there surrender himself to the said Court of Bankruptcy for the Leeds district, and did then and there admit that he had been served with notice of the said adjudication of bankruptcy against himself as aforesaid, and he did then and there give his consent, testified in writing under his hand, to such adjudication of bankruptcy against himself as aforesaid, being forthwith advertised. And the jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to wit, on the 24th of November, 1855, at the parish of Leeds aforesaid, and after an act of bankruptcy committed by him the said Benjamin Scott as hereinbefore mentioned, he the said Benjamin Scott, the bankrupt as aforesaid, did unlawfully and wilfully mutilate a certain book of him the said Benjamin Scott, to wit, by tearing two leaves out of the said book, which said book, and the said two leaves so torn out of the same book by him, the said Benjamin Scott, as aforesaid, were then connected with and related to his said business as such trader as aforesaid, with intent then and there, and thereby, to defraud the creditors of him the said Benjamin Scott, against the form of the statute in that case made and provided."

The evidence against him consisted principally of his own examination before the Court of Bankruptcy. The following is a specimen of that examination:—

"You have stated that the entries as to Clarkson's account were in your account books, and are now torn out. I now ask you where are those two leaves, and what has become of them?"

"I don't know nothing about the leaves."

"That answer is not satisfactory; and if you don't give me a better answer, I shall commit you to York Castle until you do answer."

"My brother was there at the time, and he saw Mr. Chambers tear them out; but I don't know where they were put."

"When did your brother tell you they were torn out?"

" Since the last examination ; about a week ago or better.
 " You just stated you did not know who tore them out.
 " I don't know, only my brother told me. He said Mr. Chambers had torn them out.
 " I am not satisfied with your answer ; and unless you tell me the truth as to those leaves, I shall commit you.
 " I don't know, only they were burnt in the fire.
 " Who burnt them ?
 " My brother told me Mr. Chambers burnt them.
 " When ?
 " At the time they were torn out at the Wheat Sheaf.
 " Where is the Wheat Sheaf ?
 " It is somewhere in Buggate.
 " When were they torn out there ?
 " The very day the books were delivered into the court, Monday, the 24th of October.
 " Then how could you use them to make out your balance sheet ?

" It was a wrong saying ; so I told a lie."

The questions put under threat of committal, and the answers to them, related to the bankrupt's trade books. The answers to those questions must have influenced the jury against the prisoner, and tended to cause his conviction. The admission of the examination in evidence was objected to by the prisoner's counsel ; but I allowed it to be read, and reserved the question of its admissibility for the opinion of the judges.

(A point was also reserved in arrest of judgment.)

May 31.

Campbell Foster, for the prisoner, contended that, in order to render any statement of a prisoner admissible in evidence against him upon a criminal charge, it must have been made voluntarily (1 Bl. Com. (Ed. Chitty) 83); and that the bankrupt's examination in the present case, though lawfully taken, was not voluntary. The Bankrupt Act (12 & 13 Vict. c. 106, s. 117), had authorized a searching examination into the bankrupt's dealings and effects with a view to a complete disclosure of his estate ; but it had not expressly or impliedly abrogated the well-established maxim of the common law *Nemo tenetur se ipsum accusare*: (*Smith v. Beadnell*, 1 Camp. 29 ; *R. v. Britton*, 1 Moo. & Rob. 297 ; *R. v. Wheeler*, 2 Moo. C. C. 45 ; *R. v. Baldry*, 2 Den. C. C. 430.) In *R. v. Garbett* (1 Den. C. C. 236), that principle was fully recognized, and it was held that, though the prisoner had voluntarily submitted to answer certain questions, he had a right to refuse, at any point of the examination, to answer questions which might criminate himself, and that, having been compelled to answer by the judge, his statement could not afterwards be used in evidence against him. The very question now raised was discussed, but not decided, in *R. v. Sloggett*, ante, p. 139, and, on that occasion, *Ex parte Cossens* (Buck, 531), and *Ex parte Kirby* (1 Mont. & M'Arth. 212), were referred to. In those cases, Lord Eldon and Lord

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Lyndhurst seem to have considered that the power given to bankruptcy commissioners by no means overruled the ancient common law maxim.

Overend, contra.—The real question is, whether the examination is lawfully taken; for, if it is lawfully taken, it is admissible in evidence. The cases cited are all distinguishable upon that very ground. The evidence was rejected in *R. v. Garbett*, because the examination was unlawfully taken, the witness having been compelled to answer what he was not bound to answer. The same observation applies to all the other cases; for, both in *Ex parte Cossens* and *Ex parte Kirby*, it is clear that the questions put were considered not to be lawful questions, as not relating to the trade, dealings, or estate of the bankrupt. Here it is not disputed that the examination was lawfully taken under s. 117 of the Bankrupt Act. There are many statutes in which it has been expressly provided that examinations taken under them should not be afterwards used in evidence against the examinant upon any criminal charge; and the absence of any such provision in the Bankrupt Act raises a strong presumption that no such protection was intended. (He referred to 5 Geo. 4, c. 129, s. 6; 7 & 8 Geo. 4, c. 29, s. 52; 15 & 16 Vict. c. 57, ss. 8, 9, 10; 17 & 18 Vict. c. 38, ss. 5 and 6; c. 102, s. 35.)

Cur. adv. vult.(b)

JUDGMENT.

Lord CAMPBELL, C.J.—This case was argued before my brothers Alderson, Coleridge, Willes, Bramwell and myself. We have differed in opinion, and after great deliberation, notwithstanding our desire to come to a unanimous judgment, we still differ. The judgment, which I will now read, is concurred in by my brothers Alderson, Willes, Bramwell and myself; my brother Coleridge differs. We are of opinion that the defendant's examination before the Court of Bankruptcy was properly admitted in evidence by my brother Willes, and that the conviction ought to be confirmed. This examination was taken in strict conformity to section 117 of 12 & 13 Vict. c. 106, which enacts that the bankrupt may be examined by the court "touching all matters relating to his trade, dealings or estate, or which may tend to disclose any secret grant, conveyance or concealment of his lands, tenements, goods, money or debts." No objection was made during the argument at the Bar (and we think that no objection could have been made), to the questions which were put to the bankrupt, or to the obligation upon him to answer those questions. They all touched matters relating to his trade, dealings or estate, and tended to disclose concealment of his goods, money or debts. If so, we consider it quite clear that he was bound to answer them, although by his answers he might criminate himself. On referring to *Ex parte Cossens*, Buck, 531, and the other cases upon this point, the result seems to

(b) The point in arrest of judgment was, that the indictment did not show that the trader had resided or carried on business in the Leeds district for six months before filing his declaration of insolvency, as required by sect. 16 of 17 & 18 Vict. c. 119; but the Court said that the objection was answered by the dates stated in the indictment.

be that a question cannot be put to a bankrupt which does not touch his trade, dealings or estate, or the direct object of which is to show that he has committed a criminal act, yet that he cannot refuse to answer a question which does touch his trade, dealings or estate, although the answer may tend to show that he has concealed his effects, or been guilty of any other offence connected with his bankruptcy. This distinction accounts for the *dicta* of Lord Eldon and other judges respecting the questions which may be put to a bankrupt; and we think it would be in contravention of the expressed intentions of the Legislature to permit the bankrupt to refuse to answer such questions; for, ever since the reign of Elizabeth, successive statutes have been passed purporting that, to guard against frauds in bankruptcy, the bankrupt, when called upon to answer questions respecting his estate and effects, should not be allowed to avail himself of the common law maxim, *Nemo tenetur se ipsum accusare*. There is no physical compulsion to enforce the obligation, and the refusal to answer is not made an offence subjecting the bankrupt to any specific punishment; but the questions, although tending to criminate the bankrupt, are made lawful, and if he refuses to answer them he is liable to be committed and imprisoned, as upon a refusal to answer any other lawful question. The present defendant, when before the Court of Bankruptcy, did, after objections properly overruled, answer questions put to him relating to his trade, dealings and estate, which tended to disclose a fraud about concealment of his property. His examination was taken down in writing and signed by him, and we are to determine whether this examination was admissible evidence against the defendant upon an indictment charging him with altering, mutilating and falsifying his books with intent to defraud his creditors. In *Reg. v. Garbett*, and in other cases, it has been held that where the defendant had been improperly compelled to answer questions tending to criminate himself his answers cannot be given in evidence against him; but as the report of *Rez v. Merceron* (2 Stark. 366), was said by Lord Tenterden not to be correct, we have no decision to guide us as to the admissibility of this examination, which was perfectly lawful. Being a genuine document signed by the defendant, *prima facie* it is admissible against him, and we will consider the several grounds on which the defendant's counsel has argued that it is not admissible. The first is that the examination of the defendant was after making a declaration according to the form in schedule W of 12 & 13 Vict. c. 106, which is tantamount to an oath, and that, if on oath, it would have been inadmissible. But, in the case referred to in support of this objection, (c) the oath had been improperly administered, without authority, and if the examination is taken under an oath, administered by proper authority, there is no reason for saying that it is less likely to be true than if it had been without an oath or any similar solemnity. The next ground of objection is that the examination was compulsory. It is a trite maxim that the confession of a crime, to be admissible against the party confessing, must be voluntary; but this only

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means that it shall not be induced by improper threats or promises; because, under such circumstances, the party may have been influenced to say what is not true, and the supposed confession cannot be safely acted upon. Such an objection cannot apply to a lawful examination in the course of a judicial proceeding. Then the defendant's counsel objects that, in the course of this examination, threats were used; the alleged threats, however, were merely an explanation of the enactment of the Legislature upon the subject, and a warning to the defendant of the consequences which, in point of law, would arise from his refusing to give a true answer to the questions put to him. Finally, the defendant's counsel relies on the great maxim of English law, *Nemo tenetur se ipsum accusare*. So, undoubtedly, says the common law of England. But Parliament may take away this privilege, and enact that a party may be bound to accuse himself—that is, that he must answer questions by answering which he may be criminated. This act of Parliament, 12 & 13 Vict. c. 106, creates felonies and misdemeanors, and compels the bankrupt to answer questions which may show that he has been guilty of some of those felonies or misdemeanors. The maxim of the common law, therefore, has been overruled by the Legislature, and the defendant has been actually compelled to give, and has given, answers showing that he is guilty of the misdemeanor with which he is charged. The accusation of himself was an accomplished fact; and at the trial he was not called upon to accuse himself. The maxim relied upon applies to the time when the question is put, not to the use which the prosecutor seeks to make of the answer when the answer has been given. If the party has been unlawfully compelled to answer the question, he shall be protected against any prejudice from the answer thus illegally extorted; but a similar protection cannot be demanded where the question was lawful, and the party examined was bound by law to answer it. At the trial the defendant's written examination, signed by himself, was in court, and the reading of it as evidence against him could be no violation of the maxim relied upon. The only argument, as we conceive, that can plausibly be put for the defendant is, that there is an implied proviso to be subjoined to the 117th section, viz., "that the examination shall not be used as evidence against the bankrupt on any criminal charge." To make it evidence there could be no necessity for any express enactment for that purpose, and an implied proviso appears all that can be contended for. But by this interpolation we may be more likely to defeat than to further the intention of the Legislature. Considering the enormous frauds practised by bankrupts upon their creditors, the object may have been in an exceptional instance to allow a procedure in England universally allowed in many highly civilised countries. Suppose sect. 117 had begun with a preamble reciting the frauds of bankrupts, and the importance of having these frauds detected and punished, it would be difficult to say that the Legislature intended that no use should be made of the examination except for civil purposes. When the Legislature compels parties to give evidence accusing themselves,

and means to protect them from the consequences of giving such evidence, the course of legislation has been to do so by express enactment, as in 6 Geo. 4, c. 129, s. 6, and the five other instances adduced in the argument on behalf of the prosecution. We therefore think we are bound to suppose that in this instance, in which no such protection is provided, it was the intention of the Legislature to compel the bankrupt to answer interrogatories respecting his dealings and conduct as a trader, although he might thereby accuse himself, and to permit his answers to be used against him for criminal as well as civil purposes.

COLERIDGE, J.—I have the misfortune, in this case, to differ from the rest of the court, and entertaining unfeignedly a great distrust of my own opinion, I should gladly surrender it to theirs if I could divest myself of the belief that the judgment, which I venture to think erroneous, goes also to impair a maxim of our law as settled, as important, and as wise as almost any other in it—and consequently that it is a duty to enter my protest, however ineffectually, against it. The maxim to which I allude will, of course, be understood to be that which is familiar to all lawyers—that no person can be compelled to criminate himself. It would be wasting time to support this maxim by authorities, or to dwell upon its importance. The judgment from which I differ does not proceed upon a denial or disparagement of it, but on some such argument as this—every lawful examination of a party charged, conducted according to law, is admissible evidence against him; this examination was lawful by statute, and has been lawfully conducted, therefore this examination is admissible evidence against the prisoner. Now, I deny the major premise of this syllogism. I say that it is not true in the general and unqualified way in which it is stated. I say that an examination may be lawful for certain purposes, and be lawfully conducted with those purposes in view, and yet not be admissible in evidence against the party charged, when upon his trial on a criminal charge, even if that charge be founded on the matters before lawfully inquired into. We have here, on the one hand, an undisputed and indisputable maxim of the common law, that no man shall be bound to accuse himself; on the other, we have a statute, not in terms professing to abrogate this maxim, but authorizing commissioners of bankrupts to examine a bankrupt “touching all matters relating to concealment of his lands, tenements, goods, money or debts,” and subjecting him to imprisonment indefinitely without bail, if he refuse to answer. The same statute makes it felony, punishable with transportation for life, for a bankrupt to conceal any part of his real or personal estate to the value of 10*l.*, with intent to defraud his creditors. How then, upon general principles, are we to proceed in a seeming conflict between the common law and these provisions of the statute? Not, I apprehend, by assuming at once that there is a real conflict, and sacrificing the common law, but by carefully examining whether the two may not be reconciled, and full effect be given to both; and for this purpose

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it is most material to ascertain with what intent and for what object the bankrupt is compelled to undergo this examination, and to answer the questions put. If, for example, it should appear that he was to be examined with a view of procuring evidence against him on a criminal charge instituted or to be instituted, whatever one might think of the justice of such an enactment, it would be idle to contend that it had not abrogated *pro tanto* the common law. If, on the other hand, it should be clear that the examination was authorized solely for the better discovery of the bankrupt's estate, and the bringing it into distribution among his creditors—that it would be unlawful to examine him for any other purpose—that he might lawfully refuse to answer any questions put merely for the purpose of extracting evidence against him on a criminal charge—then I conceive that you would be far advanced on your way to a conclusion which will prevent the statute from breaking in upon the common law. Then I think the judge who is trying the prisoner ought to say, The examination which could not have been instituted for the purpose of procuring evidence against the prisoner must not be used as evidence against him now—that which cannot be done directly must not be done indirectly—the answer which the prisoner could not have been compelled to give if the question had been put in order to use that answer to-day, must not be used to-day, though the question was not so put, but ostensibly on a ground which prevented him from then demurring to answer it. The examination was lawful only for a special purpose, and in derogation of the common law and the principles of justice: it is a fraud upon that common law and those principles which no court will lend itself to, even if the examination were *bonâ fide* instituted for the prescribed purposes, to use the answers afterwards for a totally different, and in itself unlawful, purpose. Now I suppose it will not be denied that the bankrupt's examination is purely what I have here supposed, for the purpose of getting at his estate, and ascertaining his dealings so far as may be necessary for regulating the decision of the commissioners as to his certificate. Beyond these limits they cannot travel; within them they are not directly criminal judges, nor ancillary to those who are. They may examine the bankrupt, and he can only refuse to answer on peril of imprisonment, as to all matters touching his property; and in so doing it will be scarcely possible, or impossible in a vast number of cases, not to elicit evidence which may tend to criminate him; but then he is not before a criminal court, nor on his trial for any of the offences which he so discloses incidentally. He does not need the protection of the common law there, and nothing in the statute expressly takes that away, or shows that it was intended to deprive him of the benefit of it elsewhere. The two cases that have been mentioned by my Lord illustrate the principle for which I contend, and they show the clear opinion of Lord Eldon and Lord Lyndhurst, that the stringent powers of the commissioners could not be allowed to violate what the former called "one of the most sacred

principles in the law of this country—that no man can be called upon to criminate himself if he choose to object to it.” In that case (*Ex parte Cossens*, Buck, 531), a petition was addressed to Lord Eldon, praying that the petitioners might be allowed to examine a bankrupt fully touching his estate and effects, and “particularly whether he or any one in trust for him or for his benefit has received, or is to receive, any sum or sums of money, or other valuable consideration for having resigned, or as an inducement to resign, the office of town clerk of the city of Bristol.” He dismissed the petition, and in the course of a very valuable judgment, he drew the line clearly and distinctly, upholding the power to inquire into all receipts of money, or securities which could be available to increase the estate; but when the question came to this, “Did you, through an illegal act, acquire either the one or the other?” he says he should have told the bankrupt, as every judge in the country, he says, used to do, that he was not bound to answer. Suppose, then, that a bankrupt, having had the question put to him, and demurred to it, had been compelled to answer, is it to be believed that Lord Eldon would have received the answer to prove the case for the prosecution of the bankrupt for the offence so disclosed? In *Ex parte Kirby* (1 M. & McAr. 212), a bankrupt demurred to a question, “because it might expose him to a criminal prosecution.” The commissioners overruled the objection, and committed him. He came up on *habeas corpus*. The case was argued at great length, and very learnedly and ably, by Mr. Collinson and Mr. Rose. The former went through all the cases, and they were fully discussed between him and Lord Lyndhurst, who finally discharged the bankrupt. He said, “It is by no means clear that the inquiry would be beneficial to the bankrupt’s estate; but even if it was likely to prove advantageous, there is not any authority to show that the commissioners may dispense with the general rule of law, that no person can be compelled to criminate himself.” These cases go very far to show that, even before the commissioners, the statutes do not intend to destroy the common law maxim; but the present case is *à fortiori* to these. I admit that it must be very often difficult for the commissioners to draw the line; for it is clear that the bankrupt must answer as to all circumstances respecting his property, and the facts he so discloses may raise inferences against him—he must answer or abide the consequences. But the difficulty would be incalculably lessened, and the law much more effectually administered, as regards the estate, if you confine the examination to its legitimate object, and not examine the bankrupt with the terror of making evidence against himself at the Old Bailey in the answers he gives. It must not be supposed that this is a new question arising in respect of any new powers conferred by the Bankrupt Consolidation Act. Under the 5 Geo. 2, c. 30, concealment by a bankrupt, to the amount of 20*l*., was felony without benefit of clergy, and the commissioners had the same power of examining him. Was a capital conviction ever heard of, or

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could it have been tolerated on evidence so extorted from the prisoner himself? It is a question, too, of wider extent than may seem at first sight; not merely as regards the bankrupt it may arise, but also as regards his wife, or any witness who has had dealings with him. All and each of these may be examined as to matters which may implicate them in some criminal transaction—subject them to some criminal charge. They cannot refuse to answer if the questions relate to the bankrupt's estate, and the rule which the court is about to lay down must equally apply to them. It is something, I think, to be considered that, with the bankrupt law substantially in its present state for centuries, the question now for decision has never come to be decided before. If examinations have not been tendered in evidence it is intelligible; but why have they not been? After the decision of this court, there is no hazard in predicting that a short mode will be found of proving cases against bankrupts; and, be it observed, a different mode from that in which offences are proved against other criminals. And how will the proof be procured? I wish to make no reflections against Commissioners of Bankruptcy—men admirable many of them for the zeal, learning and integrity with which they discharge very important and sometimes very difficult duties, but I object to the evidence for the prosecution being made up by this new and un-English mode, the compulsory cross-examination of the prisoner, apart from the judge and jury who are to try him—he very often wholly unprotected, even under the presidency of a commissioner. Even so, it seems to me highly objectionable. But what if there be no commissioner? Since the reservation of the present case I had to try a bankrupt for mutilation of his books. His examination was tendered in evidence. I said I should receive it and reserve the points, but I was desirous of some preliminary inquiry, and it turned out that the persons present were the assignee's solicitor, his clerks, and the bankrupt. The commissioner's chair was there, but it was empty. This was not proper, but it was tolerable, if the only object was to ascertain from the bankrupt where his property was to be found. It was intolerable, and I am certain no commissioner would have been found guilty of such neglect of duty, if it had been considered that the purpose or the result of the meeting had been, or might be, to extract the evidence upon which alone, a few years ago, the bankrupt might have been hung, on which now he may be transported for life. The exposure and punishment of fraud may be purchased too dearly. I think they are, if, in order to arrive at them, we break down what I venture to call, after Lord Eldon, a sacred principle of our law. No doubt the statute must be obeyed—I do not seek to evade it—it is a wise statute if you confine it to the objects for which it was made: and it may be, in my opinion, strictly obeyed within those limits, and no violence be done to the common law. I regret the great length to which my remarks have run; it had unfortunately escaped me that judgment was to be given this morning, and I have really not had the

time I could have wished properly to arrange or compress them. In my opinion, the bankrupt's examination was not admissible.

ALDERSON, B.—I have nothing to say to what has fallen from my brother Coleridge but this, that my judgment proceeds upon the ground that if you make a thing lawful to be done, it is lawful in all its consequences; and one of its consequences is, that what may be stated by a person in a lawful examination may be received in evidence against him. That is quite settled and conformable to a most important maxim of the English law.

Conviction affirmed.

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COURT OF CRIMINAL APPEAL.

November 15th, 1856.

(Before POLLOCK, C. B., COLERIDGE and WILLES, JJ.,
BRAMWELL and WATSON, BB.)

REG. v. MARY BRIGGS. (a)

Bigamy—Absence for seven years—Evidence of knowledge—Possession of means of knowledge—Onus of proof—Imperfect finding.

Upon a trial for bigamy, in which it appeared that the first husband had been continually absent from the prisoner for the space of seven years next preceding the second marriage, the jury, being asked to consider whether she knew her husband to be alive at the time of the second marriage, and if not, whether she had had the means of acquiring the knowledge, found that they had no evidence of her knowledge, but were of opinion that she had the means of acquiring knowledge if she had chosen to make use of them.

Held, that upon that finding the conviction could not be sustained, inasmuch as it left it uncertain whether, in fact, she had or had not the knowledge.

THE following case was stated by Mr. Justice Coleridge:—
The prisoner was tried and convicted before me at the Summer Assizes, 1856, for Cambridge, on a charge of bigamy. The two marriages were satisfactorily proved, the first with John Briggs, on the 22nd January, 1844, at Altonberry, the second with William Cooper, on March 27th, 1856, at Cambridge. The prisoner, on both occasions, was married by her maiden name of Riggle; and William Cooper, who was called, swore that she had

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represented herself to him as a single woman. Altonberry and Cambridge are both in the same county, and about twenty-four miles apart. John Briggs was considerably older than the prisoner, a labouring man, living in lodgings, working at a farm about two miles from Altonberry. Sometimes absent from it for a month at a time. It was said that she had left him at the end of four months from the marriage, and the witness who stated this had not seen her subsequently.

On this evidence, it was contended for the prisoner that it must be taken, that the husband had been continually absent from the prisoner for the space of seven years next preceding the second marriage. That there was no evidence that she knew him to be living at the time of such marriage, and that she was not bound to make any inquiry.

I desired the jury to say whether, in their opinion, the prisoner knew her husband to be alive at the time she contracted the second marriage; and, if not, whether she had had the means of acquiring the knowledge, directing them, even if they thought her ignorant in fact of her husband's being alive, still to find her guilty if they also thought that, by the exercise of reasonable diligence in making inquiry, she might have informed herself and neglected to use such diligence.

The jury said they had no evidence of her knowledge, but were of opinion that she had the means of acquiring knowledge if she had chosen to make use of them.

I directed a verdict for the Crown, but bailed the prisoner and respited the sentence.

I now request the opinion of the judges on the propriety of the conviction.

Power, for the prisoner.—The statute 9 Geo. 4, c. 31, s. 22, provides that nothing therein contained shall extend to any person marrying a second time, "whose husband or wife shall have been continually absent from such person for the space of seven years then last past, *and shall not have* been known by such person to be living within that time;" and this conviction cannot be supported, because the prosecution did not give any evidence that the prisoner knew her first husband to have been alive. In *R. v. Jones* (Car. & M. 614), Cresswell, J., after reading the words of the section said, "Here it appears that the prisoner's wife has been absent sixteen or seventeen years, and living seventeen or eighteen miles from the prisoner, which is much further than a person in his situation would go, and the second wife has proved that she never knew or heard of a former wife. There is no proof that the prisoner knew that his first wife was living, and in the absence of that proof, I think he comes within the proviso." Besides it is contrary to principle to require the prisoner to prove her ignorance. It rests with the prosecution to make out knowledge, in fact, whenever it appears that there has been a continual absence for seven years.

BRAMWELL, B.—Upon whom is the onus of proof? If the

statute had said that it should not extend to any person "*who shall have been ignorant*" that the first husband was alive, would not she be bound to give some evidence?

Power.—It is submitted that she would not. But in this case the jury were told to find her guilty, even supposing her to have been ignorant, if she had the means of knowledge. The statute however says nothing about the means of knowledge.

POLLOCK, C. B.—I do not see how the question can depend upon the possession of means of knowledge, even if the onus of proving ignorance is on the prisoner; though as to that I certainly entertain great doubt. I am not aware of any case, except under some of the statutes relating to the revenue, in which upon a criminal charge the burthen of proving a negative is cast upon the prisoner.

WILLES, J.—In Mr. Best's book on the Principles of the Law of Evidence, which is one of the ablest on the subject, the rule with respect to proving negatives is thus limited. "But when the negative ceases to be a *simple* one—when it is qualified by time, place, or circumstance, much of this objection is removed, and proof of a negative may very reasonably be required, when the qualifying circumstances are the direct matter in issue, or the affirmative is either probable in itself or supported by a presumption, or peculiar means of proof are in the hands of the party asserting the negative:" (Best, p. 336.)

BRAMWELL, B.—Would the jury have been warranted in finding ignorance in fact, in this case?

Power.—They ought to have so found, there being no evidence of knowledge. It would be very difficult for a prisoner to prove negative.

BRAMWELL, B.—It would be easy enough to give some *prima facie* evidence of it, as by calling witnesses who, having the same opportunity of knowledge as the prisoner, had not heard of it.

COLERIDGE, J.—It seems to me, certainly, that if the onus is cast upon the prisoner, the finding of the jury shows that she was not satisfied it, and there were circumstances in the case to lead to a strong suspicion, at all events, that she knew.

Power.—Under the earlier statute (1 Jac. 1, c. 11) no question rose as to knowledge; the mere fact of absence beyond the seas for seven years being deemed a sufficient defence; but in the present case, the circumstances raising a suspicion of knowledge were not at all stronger than they were in *R. v. Jones*, in which an acquittal was directed.

No counsel appeared for the prosecution.

POLLOCK, C. B.—We are all of opinion that the conviction is wrong. The jury merely find that they had no evidence of her knowledge, the effect of which must be that she did not know; but they were of opinion that she had the means of acquiring knowledge if she had chosen to make use of them. It may be that the means of knowledge which a person possesses are very easy or very difficult; if they are so easy that the information may be

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obtained by putting a question to any one on a market-day, the possession of such means of knowledge might, if coupled with other circumstances, such as that which is found here, namely, the second marriage being contracted in the maiden name, warrant a finding that she did know, and upon such a finding the conviction might be sustained. But in the absence of such finding, I do not think that we can supply it from the fact that she had the means of acquiring knowledge. As to the question upon whom the burthen of proof is cast, that is a doubtful matter, and one upon which I do not wish to give any opinion at present. And I therefore merely say that the jury having found that they had no evidence of knowledge, in my opinion the conviction cannot be upheld.

COLERIDGE, J.—Concurring in the conclusion to which the court has come, I am nevertheless anxious that no opinion should now be expressed upon the important questions raised during the argument. With respect to the interpretation to be put upon the finding of the jury, I do not quite agree with the Lord Chief Baron. I do not think the jury meant to find that the prisoner, in fact, did not know. They say that they had no evidence that she did know, but they also find that she had the means of knowledge; and if I were to draw any conclusion from that verdict, I should rather say that the jury considered that she probably did know, though the evidence was not quite sufficient to warrant them in finding that fact. On the simple ground, however, that the finding is imperfect, I concur in holding the conviction wrong.

WILLES, J.—The case does not find that she had the knowledge; and I think, therefore, that the conviction must be quashed.

BRAMWELL, B.—I am of the same opinion on this ground: it may be that the jury ought to have been directed upon this evidence to find, and ought to have found, that the prisoner did not know; that in fact she was ignorant of the existence of her former husband. But upon that they have expressed no opinion. All that they have done is not to find that she knew; and we cannot say, that if the question had been put to them distinctly, they would not have gone on and said affirmatively that she did not know. We cannot, therefore, support the conviction.

WATSON, B., concurred.

Conviction quashed.

COURT OF CRIMINAL APPEAL.

November 15, 1856.

(Before POLLOCK, C.B., ERLE and WILLES, JJ., BRAMWELL and WATSON, BB.)

REG. v. BAILEY. (a)

Embezzlement by a clerk at a railway station belonging to several companies—Indictment charging him as the servant of one of the companies, and also as servant of the four—Evidence.

A. was employed as a delivery clerk at a railway station belonging to four different companies, and maintained out of a joint fund. He was appointed and liable to be dismissed by a managing committee, composed of directors of the several companies. His duty was to deliver parcels which arrived at the station by the trains of the different companies, and to pay over the money which he received to the chief clerk of the parcels' office, by whom it was paid over to the cashier, who kept a separate account for each company, and paid over to each company the amount received for parcels carried by each. The chief clerk and cashier were appointed by the committee. Loss by negligence or embezzlement of a station servant was usually made good to the particular company out of the general station funds.

An indictment for embezzlement charged him in different counts as the servant of the one company, whose money he had embezzled; in another as the servant of the four companies; in a third as the servant of the committee; and in a fourth as the servant of the station manager:

Held, that at all events he was rightly charged as the servant of the four companies.

THE prisoner was tried and convicted before the Recorder at the last July session for the city of Chester, on a charge of embezzlement. The first count of the indictment charged that the prisoner, on, &c., being then employed as a servant of the Great Western Railway Company, did by virtue of his said employment, and while he was so employed, receive and take into his possession certain money, to the amount of 2s., for and in the name and on the account of the said Great Western Railway Company, his masters, and that he embezzled the same. Another count in

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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companies.*

respect of the same embezzlement charged the prisoner with being the servant of the Great Western Railway Company, the London and North Western Railway Company, the Chester and Holyhead Railway Company, and the Birkenhead, Lancashire and Cheshire Junction Railway Company, and as having received the money for and in the name and on the account of those four companies. A third count in respect of the same embezzlement charged him with being the servant of John Williams, and seven other persons named, and as having received the money for and in the name and on the account of those eight persons. And a fourth count in respect of the same embezzlement, charged him as being the servant of Robert Lewis Jones, and as having received the money for and in the name and on the account of the said Robert Lewis Jones. There were other similar sets of counts in respect of two other subsequent acts of embezzlement.

It appeared from the evidence, that the general railway station at Chester was built upon land in part belonging to each of the four railway companies, whose lines of railway, at the time when it was built, ran through or into Chester, namely, the London and North Western, the Shrewsbury and Chester (since amalgamated with the Great Western), the Chester and Holyhead, and the Birkenhead, Lancashire and Cheshire Junction Railway Companies; that the station is maintained at the joint cost of the above-mentioned companies (except that the Great Western is now in the place of the Shrewsbury and Chester) out of a fund contributed by them in certain agreed proportions, and that it is under the management of a committee of eight gentlemen, directors of these four companies, being the persons named in the count thirdly above mentioned, two of whom are appointed by each company, and who are called "The General Station Committee." This committee appoints, dismisses, and pays out of the fund above mentioned the wages of the officers, clerks, and other servants who are employed at the station. Amongst these are the "delivery clerks," whose duty it is to deliver to persons in the city of Chester, and its neighbourhood, parcels which arrive at the station by the trains of any of the four companies addressed to such persons; to receive from them the sums charged for the carriage and delivery of such parcels, and on the night of the same day to account for and pay to the chief clerk in the parcel office the total of the sums so received by them during the day. For the performance of this duty each of the delivery clerks has given to him each morning a delivery book, into which, before the parcels are handed to him for delivery, the particulars of them are copied in the parcel office from the several way-bills of the trains by which they are brought to the station. The chief clerk of the parcel office each night gives the delivery clerk a receipt in his delivery book for the money actually paid over by him in respect of the day's receipts; and any moneys due for parcels delivered on that day, which the delivery clerk has not been able to collect, are carried forward in his delivery book as a balance to the account of the next day

The chief clerk of the parcel office on the same day pays over the money so received by him to the "cashier" of the general station committee to the accounts of the several companies to whom the same respectively belong. The cashier keeps a separate account for each company, and on the same day pays the money over directly to the company to which it belongs or to its bankers. The cashier and chief clerk of the parcel office are appointed, paid and dismissed by the general station committee in manner herein-before mentioned.

On the morning of the 26th Feb. 1856, two parcels came from London by a train of the Great Western Railway Company to the Chester station, addressed to Messrs. Prichard and Roberts, book-sellers, Chester, on which, according to the way-bill, there were the sums of 5*s.* and 1*s.* 6*d.* respectively to pay for the carriage of them. These parcels, with many others, on that morning were given to the prisoner for delivery, the particulars thereof having been entered from the way-bill in his delivery book, in the manner above described. The total amount "to pay" for parcels to be delivered by the prisoner on that day was 2*l.* 14*s.* 11*d.*, the total amount which was accounted for in the delivery book, and paid over by him in respect of that day's delivery, was 1*l.* 12*s.* 7*d.*, the balance, 1*l.* 2*s.* 4*d.*, being carried forward to the next day. The prisoner received from Messrs. Prichard and Roberts the sum of 5*s.* and 1*s.* 6*d.* in respect of their said parcels, but the sums which, at the time of such accounting and payment, appeared on the face of the delivery book as having been charged to and received in respect of these parcels were 3*s.* and 1*s.* 6*d.*, the 3*s.* having been written by the prisoner over an erasure of the 5*s.*, and the 1*l.* 12*s.* 7*d.* was accordingly less by 2*s.* than the actual amount received by the prisoner on that day.

Similar evidence was given with respect to other parcels which also came by trains of the Great Western Railway Company, and were delivered by the prisoner to the other persons in Chester on two subsequent days. The chief clerk of the parcel office paid over on the same day the moneys received by him from the prisoner in respect of these parcels, to the cashier of the general station committee; and the cashier on the same day paid the same to the bankers of the Great Western Railway Company to the account of that company. Mr. Robert Lewis Jones is the general manager at the Chester station, and he also is appointed and paid by the general station committee. He had not any power of appointing or dismissing any of the officers or servants employed at the station. Mr. Jones stated in his evidence, that in cases of loss by the negligence or embezzlement of a station servant, the usage had been to make good the loss to the particular company by whom it was suffered out of the funds of the general station committee; thus losses by negligence had very frequently been made good, and losses by embezzlement on three or four occasions. The fund out of which these losses are made good, is a different fund from that which is in the cashier's hands for payment over to

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—

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belonging to
several
companies.*

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Embezzlement
—*Servant at*
railway station
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several
companies.

the several companies, or their bankers, as before mentioned; it is in the hands of Messrs. Dixon and Wardell, bankers of Chester, as the bankers of the general station committee, and is drawn out by cheques, signed by the general manager.

Upon this state of facts it was objected by the prisoner's counsel that no count of the indictment was supported by the evidence, for that the prisoner was not the servant of the Great Western Railway Company, or of the four companies, or of Mr. Jones, and that, if he was the servant of the general station committee, he did not receive the moneys alleged to have been embezzled by him, for or on account or in the name of that committee, but for and on account and in the name of the Great Western Railway Company: (*Reg. v. Townsend*, 1 Den. C. C. 167; *Reg. v. Beaumont*, 1 Dearsley's C. C. 270, were cited.)

The Recorder reserved these objections for the decision of this court, and left it to the jury to say whether the prisoner had fraudulently retained for his own use the sums which he had received over and above those which he had accounted for and paid over. The jury found the prisoner guilty of all the charges alleged in the indictment, and thereupon the Recorder respited the sentence and admitted him to bail until the judgment of this court should have been given upon the points reserved. The question respectfully submitted for the decision of this court therefore is, whether any of the counts of the indictment was supported by the evidence.

No counsel appeared for the prisoner.

Parry, Serjt., for the Crown, was stopped by the court.

POLLOCK, C. B.—We think that the prisoner was, at all events, the servant of the four companies, and the conviction may therefore be sustained on that count.(b)

ERLE and WILLES, JJ., and BRAMWELL and WATSON, BB., concurred.

Conviction affirmed.

(b) The Court did not advert to the other allegation in that count, that the prisoner received the money for and on account of the four companies; and it seems doubtful whether the evidence would sustain that allegation.

COURT OF CRIMINAL APPEAL.

November 15, 1856.

Before POLLOCK, C.B., ERLE and WILLES, JJ., BRAMWELL,
and WATSON, BB.)

REG. v. WEST. (a)

larceny—Country bank-notes in course of transmission from one branch bank to another—Description of notes in indictment as money.

A. was indicted for stealing 95l. in money. The evidence was, that he stole certain notes of a country bank which were not then in circulation, for value, but which had been paid in at one branch of the same bank, and were in course of transmission to another branch, where they had been originally issued, in order that they might be there reissued or otherwise disposed of.

Held, that A. was guilty of larceny; and that, since the 14 & 15 Vict. c. 100, s. 18, the offence was correctly described in the indictment.

FREDERICK WEST and Elizabeth West were charged upon the following indictment, the said Frederick West with stealing 95l. in money, and the said Elizabeth West with receiving 95l. in money, part of the said 95l., knowing them to have been stolen.

Isle of Ely, } The jurors for our sovereign Lady the Queen
to wit. } upon their oath present, that before and at the
time of the committing of the offence hereinafter next mentioned,
Frederick West was clerk to one Robert Bell and others; and that
the said Frederick West whilst he was such clerk to the said
Robert Bell and others, to wit, on the seventh day of November,
in the year of our Lord one thousand eight hundred and fifty-five,
at Wisbeach, in the Isle of Ely, and within the jurisdiction of
this court, feloniously did steal, take, and carry away, ninety-five
pounds in money, of the moneys, goods, and chattels of the said
Robert Bell and others, his said masters as aforesaid, against the
form of the statute in such case made and provided, and against
the peace of our said Lady the Queen, her crown and dignity.
And the jurors aforesaid, upon their oaths aforesaid, do further
present that Elizabeth West, on the seventeenth day of November in

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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*Larceny—
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the year of our Lord one thousand eight hundred and fifty-five, at Manca, in the Isle of Ely aforesaid, and within the jurisdiction aforesaid, feloniously did receive five pounds in money of the moneys, goods, and chattels of the said Robert Bell and others, being part of the said ninety-five pounds in money above mentioned, so as aforesaid feloniously stolen, taken, and carried away; she, the said Elizabeth West, then well knowing the said moneys, goods, and chattels to have been feloniously stolen, taken, and carried away against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

The manager of the National Provincial Bank of England, at Boston, enclosed, in an envelope addressed to the manager of the same bank at Wisbeach, nineteen 5*l.* notes of the said bank issued at Wisbeach, which had been paid into the branch bank at Boston. The bank do not reissue at one branch, notes originally issued at another branch, but transmit them to the place where they were originally issued, to be there reissued or otherwise disposed of.

The envelope, and nineteen notes enclosed therein, were put into the post-office at Boston.

The prisoner Frederick West was a clerk in the said bank at Wisbeach, and it was part of his duty to receive at the post-office at Wisbeach every morning all letters addressed to the said bank there.

On the day on which the envelope and inclosure should have been received by the bank at Wisbeach, Frederick West received the letters as usual at the post-office, and he delivered on that day several letters (through a servant) to the manager of the bank, amongst which was a letter of advice from Boston of the transmission of the nineteen notes, but the envelope with its inclosure were not delivered with the other letters by the prisoner Frederick West, who denied all knowledge of the same.

The prisoner Frederick West subsequently paid to various persons several of the said notes, and the prisoner Elizabeth West paid away one of the said notes.

The jury returned a verdict against the prisoner, Frederick West, of guilty of stealing the said notes, and against the prisoner Elizabeth West, of guilty of receiving one of the said notes knowing it to be stolen.

It was objected on behalf of the prisoner Frederick West that he could not be convicted, inasmuch as the indictment charged him with stealing "money," and although the statute 14 & 15 Vict. c. 100, s. 18, enacts "that in every indictment in which it shall be necessary to make an averment as to any money or any note of the Bank of England, or any other bank, it shall be sufficient to describe such money or bank-notes simply as money," yet, as the notes were not at the time of the alleged stealing in circulation for value, but were in the hands of the bankers themselves, or in the course of transmission from one branch of the bank to another branch of the bank, they were not in fact bank-

notes (that is, promissory notes to pay), and not being bank-notes they could not under the statute be designated by the substituted description of money.

It was submitted, on behalf of the prisoner Elizabeth West, that if the prisoner Frederick West was not properly convicted of stealing the notes, the count against her for receiving one of such notes knowing it to be stolen must fail, and that she ought not to be convicted.

Judgment on the convictions against both prisoners was postponed, and they were both remanded to prison until the question shall have been decided. The opinion of the court is prayed whether upon this verdict judgment ought to be given against both or either of the prisoners.

J. H. Mills, for the Crown, referred to *R. v. Ranson*, 2 Leach, 1090; R. & R. 232.

POLLOCK, C. B.—We all think that the conviction is good.

Conviction affirmed. (a)

(a) In *Ranson's case* the prisoner was charged with secreting a letter, containing a promissory note. The note was a bank note, which had been paid to the holder, and had not been reissued; and the judges thought that it might be properly described as a promissory note. But in the more recent case of *R. v. Vyse*, 1 Moo. C. C. 218, some of the judges doubted whether bank-notes, which had been paid in London, and were in the possession of a partner of the firm, who was taking them into the country to be reissued when they were stolen, were valuable securities within the meaning of the stat. 7 & 8 Geo. 4, c. 29, s. 5. In that case the conviction was sustained upon a count, charging him with having received certain pieces of stamped paper, the goods and chattels of the prosecutor.

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COURT OF CRIMINAL APPEAL.

November 15, 1856.

(Before POLLOCK, C.B., ERLE, and WILLES, JJ., BRAMWELL and WATSON, BB.)

REG. v. GREEN. (a)

Plea of autrefois acquit to indictment for larceny, the former acquittal having taken place on the ground that the property was laid in the wrong person.

Upon the trial of an indictment for larceny it appeared that the goods were stolen from a stall in a market at a time when the owner of the stall had left it temporarily in charge of his son, a boy of fourteen years old, who lived with his father and worked for him. The property was laid in the son, and on that account an acquittal was directed, and another bill, laying the property in the father, found by the grand jury:

Held, that a plea of autrefois acquit to that second indictment could not be sustained.

THIS prisoner was indicted at the October Sessions for the borough of Bury St. Edmunds for stealing two pairs of women's boots, the property of Rowland Britton. Rowland Britton was the son of John Britton, to whom the boots belonged, both of whom were examined as witnesses before the grand jury.

The mistake in the ownership being discovered before the grand jury were discharged, an acquittal was taken on this indictment, and a fresh bill sent up describing the boots as the property of John Britton. The grand jury having found their bill, the prisoner pleaded the following plea of *autrefois acquit*:—

“Borough of Bury St. Edmunds, 20th October, 1856.—*Regina v. Susannah Green*.—And the said Susannah Green, in her own proper person, cometh into court here, and having heard the said indictment read, saith that our said lady the Queen ought not further to prosecute the said indictment against the said Susannah Green, because she saith that heretofore, to wit, at the general quarter sessions of the peace holden at Bury St. Edmund's, in

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

and for the Borough of Bury St. Edmund's, she, the said Susannah Green, was lawfully acquitted of the said offence charged in the said indictment; and this the said Susannah Green is ready to verify. Wherefore she prays judgment, and that, by the court here, she may be dismissed and discharged from the said premises in the said indictment specified. And as to the felony and larceny of which the said Susannah Green now stands indicted, she, the said Susannah Green, saith, that she is not guilty thereof, and of this the said Susannah Green puts herself upon the country.

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Autrefois acquit
—*Misdescription of property.*

“DAVID POWER.”

Rowland Britton was then called and examined by the counsel for the prisoner. He said he had made no charge of stealing any goods of his own. That the boots stolen were the property of his father. That up to one o'clock of the day in question he had worked at the shop; that he then succeeded his father in charge of the stall from whence the goods were stolen, while he was so in charge, his father returning home. That he was fourteen years of age; lived with his father; worked for him, assisted him in his business, and obeyed his orders. That his father supported him, but paid him no wages.

On this evidence, it was contended by the prisoner's counsel: first, that Rowland Britton was a bailee of the goods; that they had been correctly described, therefore, in the first indictment, as his property. That the prisoner had therefore been in jeopardy on the first indictment, and was entitled to be acquitted. Secondly, that if the goods were not correctly described as Rowland Britton's, that the indictment was amendable under 14 & 15 Vict. c. 100, and that the prisoner ought not therefore to be placed a second time upon her trial for what was in fact but one offence.

The Recorder held, that Britton was not, under the circumstances, a bailee, and that whether the indictment was amendable or not (he thought not, as there appeared by the names indorsed on the back of the indictment to be a Rowland Britton as well as a John Britton, and that the grand jury had found the goods to belong to the former), no amendment having been made, the prisoner could not ever have been convicted on the first indictment upon the evidence produced on the second, and that she had not therefore been in jeopardy.

The jury, however, under his advice, found a special verdict, that the goods in question were the property of John Britton, and were the same as those described in the first indictment as the property of Rowland Britton, and that there was but one and the same act of larceny.

He thereupon directed a verdict upon this plea to be entered for the Crown. The prisoner then pleaded over not guilty, was convicted and sentenced to nine months imprisonment and hard labour.

Power for the prisoner.—The prisoner was in jeopardy of a conviction upon the first indictment, and was therefore entitled to plead *autrefois acquit*. The property was well laid in the son, for

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of property.

he had charge of the stall, and was a bailee of the goods, which were entrusted to him for safe keeping: (*R. v. Taylor*, 1 Leach, 356; *R. v. Statham*, ib.) The case of *R. v. Ashley*, 1 Car. & K. 198, is distinguishable. At all events, if the property was wrongly laid, the indictment might and ought to have been amended under 14 & 15 Vict. c. 100, sect. 1.

No counsel was instructed for the prosecution.

POILLOCK, C. B.—We all think the conviction right and the plea not proved.

ERLE, J.—I am clearly of opinion that the goods remained all the time in the father's possession, and could not be properly described as the goods of the son. I also think that, with reference to the plea, we must look to the acquittal which took place upon the indictment in its actual state, and not in the state to which the judge might have amended it. He was not bound to amend, and the prisoner was therefore acquitted upon an indictment upon which she was never in peril of a conviction.

WILLES, J., and BRAMWELL and WATSON, BB., concurred.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

November 22, 1856.(Before POLLOCK, C.B., COLERIDGE and WILLES, JJ.,
BRAMWELL and WATSON, BB.)

REG. v. SPENCER. (a)

*7 Will. 4 & 1 Vict. c. 89, s. 10—Setting fire to stack of grain—
Flax.**Flax with the seed in it is grain within the meaning of stat. 7 Will.
4 & 1 Vict. c. 89, s. 10.*

THE following case was reserved by BRAMWELL, B.:—

The prisoners were indicted and convicted before me at the last assizes for the county of York, on an indictment founded on the 7 Will. 4 & 1 Vict. c. 89, s. 10, which charged them with unlawfully and maliciously setting fire to a stack of grain.

The stack in question was of the flax plant, with the seed or grain in it.

The jury found that the flax seed is a grain.

Entertaining doubts whether the stack was a stack of grain within the act of Parliament, I reserved the question for the consideration of the Court of Criminal Appeal. The prisoners were not sentenced.

No counsel appeared.

POLLOCK, C. B.—The conviction must be affirmed.

Conviction affirmed.

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

COURT OF CRIMINAL APPEAL.

November 22, 1856.(Before POLLOCK, C.B., COLERIDGE and WILLES, JJ.,
BRAMWELL and WATSON, BB.)

REG. v. WILSON. (a)

*Administering poison with intent to procure abortion—Causing to be taken.**If A. procures poison and delivers it to B., both intending that B. should take it for the purpose of procuring abortion, and B. afterwards takes it with that intent in the absence of A.:**Held that A. may be convicted under the statute 1 Vict. c. 85, s. 6, of causing it to be taken.*

THE following case was stated by COLERIDGE, J. :—

The prisoner, Harriet Wilson, was tried before me at the Hertford Spring Assizes, upon an indictment framed on the 1st Vict. c. 85, s. 6, for unlawfully administering to “and causing to be taken” by one Emma Cheney certain poison (in the 2nd count stated to be a certain poisonous thing), with intent to procure her miscarriage.

It was proved that Emma Cheney, being and believing herself to be pregnant, applied to the prisoner to get her something to procure miscarriage. The prisoner asked her for 2s., and promised she would. She accordingly purchased some preparation of mercury, which she gave to her, directing her to take one-half of the quantity in gin. Emma Cheney accordingly, some little time after, and not in the prisoner’s presence, procured the gin and took the dose, which, in a few days, produced miscarriage, and made her so ill as to bring her life into danger. The jury found these facts, and that the mercury was both given to Emma Cheney by the prisoner and taken by her with intent to procure the miscarriage. I directed a verdict of guilty on this finding, but, doubting whether the charge of “administering” or “causing to be taken” was proved on this evidence, I suspended the sentence and bailed the prisoner; and I now desire the opinion of the judges on this question.

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

This case was originally argued, on May 3rd, before JERVIS, C. J., COLERIDGE, WIGHTMAN, CRESSWELL, JJ., and MARTIN, B.

No counsel appeared for the prisoner.

Carrington, for the prosecution. — This indictment is framed upon 1 Vict. c. 85, s. 6, which provides, "that whosoever, with intent to procure the miscarriage of any woman, shall unlawfully administer to her, or cause to be taken by her, any poison or other noxious thing, &c., shall be guilty of felony;" and the prisoner committed that offence by delivering the drug to the woman with instructions how she should take it, and intending that she should take it, and that it should produce miscarriage.

COLERIDGE, J.—The prisoner was not present when it was taken, and, though she gave it to the woman, the latter was at full liberty to take it or not, as she pleased. The difficulty is that this statute does not make the taking by the woman an offence; and the prisoner therefore is not an accessory before the fact, and can only be convicted if she administered or caused to be taken.

Carrington.—*Vaux's case*, 4 Rep. 44*b*, is in point. There the prisoner had persuaded another to take poison, and, though he was not present when it was taken, and the man who took it did not know that it was poison, he was convicted of murder as a principal.

JERVIS, C. J.—Is there any offence if the woman know what she is taking and consents.

Carrington.—The statute seems to assume the consent of the woman; and is directed against those who assist her in accomplishing the object of both.

JERVIS, C. J.—Probably that is so; for the section includes the use of instruments as well as the administration of poison, and the former could not be without consent.

Carrington.—A person, who supplies another with poison for the purpose of his taking it, may be said to administer it; or, at all events, he causes it to be taken. *R. v. Cadman*, (b) 1 Moo. C. C. 114; *R. v. Harley*, 4 Car. & P. 369.

CRESSWELL, J., referred to *R. v. Williams*, 1 Den. 39.

Cur. adv. vult.

In consequence of the death of the late Chief Justice of the Common Pleas, the case was ordered to be re-argued.

Carrington now appeared for the prosecution.

POLLOCK, C. B.—We need not trouble you. We are all of opinion that there was, in this case, a causing to be taken, and the conviction therefore is right.

Conviction affirmed.

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*Administering
poison.*

In *R. v. Cadman*, it appeared that the defendant gave the prosecutrix a cake, containing poison, and that she put it into her mouth, and spat it out again. It was held that the mere delivery by the defendant to the prosecutrix was not sufficient to constitute an administering.

COURT OF CRIMINAL APPEAL.

November 22, 1856.

(Before POLLOCK, C.B., WIGHTMAN, WILLIAMS, and WILLES, JJ., and WATSON, B.)

REG. v. MAINWARING. (a)

Bigamy—Marriage in Wesleyan chapel—Proof of validity.

Upon a trial for bigamy, it was proved by a witness who was present, that the first marriage took place in a Wesleyan chapel in the presence of the registrar of the district; and an examined copy of the entry in the register book of marriages, kept at the office of the superintendent registrar of the district, was also produced and proved. A document purporting to be a certificate by the superintendent registrar of the fact that the chapel had been duly registered, was also produced by a witness who stated that he saw the register book, and that it was correctly extracted.

Held, by Pollock, C.B., that the certificate so proved was admissible evidence of the fact of registration, as being an examined copy of an entry in the register; and by the rest of the court, that even if that certificate was inadmissible, there was evidence of a valid marriage, as the court must presume, from the facts proved, that the chapel was duly registered.

THE following case was reserved by WIGHTMAN, J. :

The prisoner was tried before me at the last Staffordshire Assizes for bigamy; he having, as it was alleged, on the 23rd of July, 1848, married one Eliza Goodman, in a Wesleyan chapel duly licensed for marriages, and afterwards, and in her lifetime, married one Elizabeth Outley on the 25th of December, 1855.

To prove the first marriage a witness was called, who stated that he was present at the marriage of the prisoner with Eliza Goodman, at the Wesleyan chapel at Dunstable, on the 23rd of July, 1848, and signed the register as a witness, and that they lived together as man and wife for two or three years.

A witness was then called, who proved that a certificate, of which a copy is annexed, marked A., was examined by him, with the register book kept at the office of the superintending registrar, at the union workhouse at Luton, Dunstable, being within the district of Luton, and that it was correct, and that it was signed by the superintending registrar of the district.

The same witness stated, that he examined another certificate, which he received from the superintending registrar (a copy of which, marked B., is also annexed), with the register book at his

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

office, and that it is correctly extracted, and that it was signed by the superintending registrar of the district, from whom he received it in his presence.

The same witness also produced another document (a copy of which, marked C., is also annexed), which he received from the superintending registrar, and which he signed in his presence, and which he said he examined with the register at his office, and found that it was correctly extracted.

The reception of these documents in evidence was objected to by the prisoner's counsel, on the ground that certificates were not admissible at all to show a marriage in a Wesleyan chapel, or that it was a place in which marriages could be legally solemnized, or that, if admissible, they must be authenticated by the official seal of the registrar, and not under hand only; and the following statutes were referred to:—6 & 7 Will. 4, c. 85; 6 & 7 Will. 4, c. 86; 7 Will. 4 & 1 Vict. c. 22; 3 & 4 Vict. c. 92; 8 & 9 Vict. c. 113; 9 & 10 Vict. c. 119; 14 & 15 Vict. c. 99.

As the case, as it appeared at the trial, was one of great aggravation, and the objection was to the mode of proof involving points of considerable nicety and importance, as regarded the sufficiency of documentary evidence of marriages in licensed Dissenting chapels, I admitted the documents, and allowed the case to proceed, upon the assumption that there was evidence of the legality of the prior marriage; and the prisoner was found guilty.

The question is, whether the before-mentioned documents, marked respectively A., B., and C., or any of them, were receivable in evidence, and if any of them were, whether such document or documents so admissible, with the evidence of the witness present at the alleged marriage at Dunstable, as before stated, afforded evidence of the prior marriage sufficient to sustain the conviction.

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Bigamy—
Evidence of
marriage in
dissenting
chapel.

(A.)

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CERTIFICATE OF MARRIAGE.

3. Marriage solemnized in the Wesleyan Chapel, Dunstable, in the District of Luton, in the Counties of Bedford and Hertford.

When Married.	Name and Surname.	Age.	Condition.	Rank or Profession.	Residence at the time of Marriage.	Father's Name and Surname.	Rank or Profession of Father.
Twenty-third July, 1848.	Henry Manwaring.	32 years ..	Bachelor ..	Painter ..	Dunstable	Henry Manwaring.	Painter.
	Eliza Goodman	31 years ..	Spinster ..		Dunstable	Joseph Goodman.	Carpenter.

Married in the Wesleyan Chapel according to the rites and ceremonies of the Wesleyan Methodists.

Marriage solemnized by us	{	Henry Manwaring.	{	In the	{	Thomas Wallis.	{	By me, Wright Shovelton.
		Eliza Goodman.		presence		of us		William Bunn.

I certify the above to be a correct copy, Thos. Erskine Austin, Registrar.
Luton, March 7th, 1856, T. E. A.

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—

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marriage in
dissenting
chapel.*

(B.)

The undersigned, Thomas Erskine Austin, Superintendent Registrar of the District of Luton, in the counties of Bedford and Hertford, do hereby certify, That the Wesleyan Chapel situate at Dunstable, in the county of Bedford, was duly registered for the solemnization of marriages therein, pursuant to the Act 6 & 7 Will. 4, c. 85, on the 28th day of November, in the year 1845.

Given under my hand this 29th day of March, 1856,

Thos. Erskine Austin, Superintendent Registrar.

(C.)

Henry Manwaring and Eliza Goodman were married, after notice at the Board of Guardians of the Luton Union, without licence.

Thos. Erskine Austin,
Luton, 26 March, 1856.

G. Browne, for the prisoner.—If any one of the documents was inadmissible, the conviction should be quashed; because it is impossible to say to what extent the jury may have been influenced by the inadmissible document.

WIGHTMAN, J.—No; the question is, whether there was sufficient legal evidence to warrant the conclusion that the first marriage was valid.

G. Browne.—Then, first, document A. was inadmissible. It was not stamped with the seal of the register office, as required by s. 38 of 6 & 7 Will. 4, c. 86, and is therefore not rendered admissible by that section. Nor is it admissible under the stat. 8 & 9 Vict. c. 113, s. 1, or 14 & 15 Vict. c. 99, s. 14; for the former act only gets rid of the necessity of proving the seal or the official character of the person signing the document, if upon the face of it it purports to be properly sealed and signed; and the latter applies only to documents with respect to which “no statute exists which renders their contents provable by means of a copy.” The statutes of 6 & 7 Will. 4, cc. 85 and 86, are very explicit in the instructions which they give. By s. 23 of c. 85, the registrar is required to register every marriage solemnized in his presence in a marriage register book to be furnished to him for that purpose from time to time by the registrar-general, according to the form provided by c. 86; and then s. 38 of c. 86, provides for the admission of sealed and certified copies of entries, but expressly enacts “that no certified copy purporting to be given in the said office shall be of any force or effect which is not sealed or stamped as aforesaid.”

WIGHTMAN, J.—But the document A. was an examined copy, and the certificate therefore was not required.

WILLIAMS, J.—If by these statutes, a marriage in a Dissenting chapel is put on the same footing as a marriage in the Church of England, then the evidence of any person who was present when the ceremony took place is sufficient. (*b*)

POLLOCK, C. B.—The document can do no harm, if there is evidence enough without it.

G. Browne.—That is another point in the case, viz., that, even if admissible, it proves no more than the witness proved, viz. the fact that a ceremony took place. It does not tend in any degree to

(*b*) See sect. 35 of 6 & 7 Will. 4, c. 85.

show that the chapel in which it took place was properly registered for the solemnization of marriages.

WIGHTMAN, J.—There was the fact that the registrar was present at the marriage, and that should be added to the case. (c)

G. Browne.—That fact does not dispense with the necessity of proving that all things were done to render this a valid marriage. And there was no proof that the books were in the proper custody. Document A. was examined at the office of the superintendent registrar, though he certifies as registrar only; and until the registry books are filled, the registrar, and not the superintendent registrar, ought to have the custody of them: (6 & 7 Will. 4, c. 86, s. 32.) Secondly, document B., which was given in evidence to prove that the chapel was duly registered, was also inadmissible. It is a certificate of the fact, not a certified copy of any entry in any book; and there is no statute which renders it the duty of the superintendent registrar to make any such entry or issue any such certificate. The mode of obtaining registration is by delivering to the superintendent registrar a certificate signed in duplicate by twenty householders, that the building has been used for a year as their usual place of religious worship, and that they desire it to be registered for the solemnization of marriages; which certificates are forwarded to the registrar-general, who is thereupon required to "register such building accordingly in a book to be kept for that purpose at the general register office" in London. The date of the registry is indorsed on the two certificates by the registrar-general, who keeps one with the records of his office and returns the other to the superintendent registrar to be kept in his office. The superintendent registrar is also required to "enter the date of the registry of such building in a book to be furnished to him for that purpose by the registrar-general:" (6 & 7 Will. 4, c. 85, s. 18.) All, therefore, that should appear in the superintendent's book is the date of registry. The registration itself is in the book of the registrar-general in London, and the proper evidence of it is a duly sealed and certified extract of the entry in that book, which might easily have been procured.

WIGHTMAN, J.—It would have been a felony to solemnize a marriage in this building, if it had not been duly registered; and everything was done which would have been done if this were a registered building.

G. Browne.—Still the conviction of a prisoner ought not to depend upon presumptions, especially as to a matter which is easily capable of legal proof.

WILLES, J.—But are we not equally bound not to presume guilt in the person solemnizing the marriage? The general rule in such a matter would be *omnia præsumuntur rite esse acta*; and the only reason for not applying it is that the guilt of a prisoner is not to be presumed; but it seems to me that the presumption of the prisoner's innocence is not stronger than that of the innocence of the person solemnizing the marriage.

(c) The case was amended during the argument by the addition of that statement.

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G. Browne.—R. v. Bowen (2 Car. & K. 227), is an authority in favour of the prisoner. In that case the marriage having been solemnized in a chapel, Platt, B. held it necessary to show either that the chapel was one in which banns had been usually published before 26 Geo. 3, c. 33, or that the chapel was built and consecrated after that act, and before 6 Geo. 4, c. 92; and that proof that marriages had been solemnized there for the last twenty years was not sufficient for that purpose. In the present case there was not even evidence of a general practice of solemnizing marriages in this chapel.

WIGHTMAN, J.—I think there was some evidence of one other marriage being solemnized there.

G. Browne.—No presumption could be founded upon a single instance, even if, contrary to *R. v. Bowen*, a general practice would be sufficient.

WILLIAMS, J.—I can recollect attempts being made to prove extracts of marriage registers in Wales, where the ceremony had taken place in unauthorized chapels, and the evidence was rejected; but then it was assumed that the marriages were illegal.

Browne.—In *Catherwood v. Caslon* (13 M. & W. 261), the mere belief of the parties that they were celebrating a lawful and formal marriage was considered insufficient in an action of *crim. con.*

WILLES, J.—That turned upon *R. v. Millis* (10 Cl. & F. 534), which I never should consider a binding authority.

Browne.—At all events it would be against both principle and authority to call upon the prisoner to prove a negative: (2 Taylor on Evidence, 1059.)

WIGHTMAN, J.—But the question is whether there is not *prima facie* evidence of its having been once registered.

Browne.—Lastly, as to document C., there is no authority for making or certifying any such entry.

M. Mahon for the prosecution.—It was quite enough to prove the marriage, in fact, the presence of the registrar, and certificate A. Upon that evidence there was a good *prima facie* case; and the burthen of showing that the building was not duly registered was thrown upon the prisoner. Section 38 of statute 6 & 7 Will. 4, c. 85, imposes the penalties of perjury upon any one signing any false certificate required by that act; and section 39 makes it felony to solemnize marriages in an unregistered chapel. Section 35 also provides, that every marriage solemnized under that act should be good and cognizable, in like manner as marriages before the passing of that act, according to the rites of the Church of England. In truth, if the argument on the other side were correct, in order to prove a marriage in a Church of England chapel licensed under that act, it would be necessary to procure a copy of the register in London; for by section 34 all such chapels are to be registered in the office in London. The document A. was not tendered as a certified copy under section 38 of c. 86; but was offered in evidence as an examined copy of the register of marriages, which is a public official record, required by the statute to be kept; and the insertion in which of any false entry

is made felony by section 43. The presumption, therefore, that all has been rightly done applies most strongly in this case. Then, as to document B., though it is worded as a certificate of a fact, it is clear from the evidence of the witness that it is in substance a correct extract from the register of buildings in which marriages may be lawfully performed.

POLLOCK, C. B.—I must say that I cannot see what more evidence can be required than was given here. Where is the proof to begin? Must the certificate of the twenty householders be produced? Suppose the registrar himself had been called and produced the book, and stated that the building was registered, I suppose it would not have been said that that was insufficient. Then, instead of that, we have a witness who examined the book in the register office, and says that the certificate is correctly extracted. Surely the correct extract is not made worse because it is also certified by the registrar.

M^r Mahon.—In *R. v. Hawes* (1 Den. C. C. 270), it was held, according to the marginal note, that “on an indictment for bigamy, where the first marriage was solemnized under the provisions of 6 & 7 Will 4, c. 85, the certificate authorized by that act, and by section 38 of 6 & 7 Will. 4, c. 86, coupled with the identity of the parties, was sufficient *prima facie* evidence of such marriage;” and when the facts of that case are looked at, the decision of the court appears even more strongly to uphold this conviction. To prove marriages in a church, it was now necessary to give evidence of licence or publication of banns (*R. v. Allison*, Russ. & Ry. 109; *R. v. James*, ib. 17); and the same principle applies to marriages in chapels since the passing of those statutes. The marriage in fact, and the presence of the registrar are sufficient to raise the presumption that the marriage was valid until the contrary be shown. (He was stopped by the court.)

G. Browne, in reply.—There is no evidence whatever that the chapel was registered, except document B.; and that is not a copy of anything. It certainly cannot be a copy or extract of the register itself, because that is in London and not at Luton.

WILLIAMS, J.—Suppose a witness had said “I went to the registrar, and he turned to a book and said it was registered, and I know he spoke the truth, because I saw the entry.”

G. Browne.—That would not have been evidence. The entry could only be proved by a copy purporting to be a certified copy on the face of it: (14 & 15 Vict. c. 99, s. 14.)

WILLES, J.—There is a passage in Best on Evidence, 563, note (b), which favours your argument. Speaking of a distinction between public and private documents, as to the nature of the secondary evidence which may be given of their contents, he says, “At first sight this may appear at variance with the maxim that there are no degrees in secondary evidence, but it does not fall within its principle, *e. g.*, a party wants to prove the contents of a *private* document in the possession of his adversary, who refuses to produce it, and for this purpose calls a witness, who offers to state

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its contents from memory. How unjust would it be if the opposite party could exclude this evidence, by showing that a copy of the document was in existence, and perhaps even made the day before the trial, with the view of enabling him to raise the objection. But this reasoning cannot apply in the case of a *public* document which is kept in a known place where every one may inspect and obtain a copy."

G. Browne referred also to 1 Taylor on Evidence, 157.

POLLOCK, C. B.—Considering the case to be amended by insertion of the statement that the registrar was present at the marriage, the only other matter to be considered is, whether the place in which the marriage was solemnized was one where it might legally take place. To prove that, document B. was produced on the part of the prosecution. That is a certificate under the hand of the superintendent registrar, perhaps not in the most correct form; for, on the face of it, it is open to the objection taken by Mr. Browne that it does not purport to be a certified copy or extract, but to be a certificate of the fact that the chapel was registered. Now, I will not say whether that is a good or a bad objection to the certificate as such; it is unnecessary to decide that, because a witness was called who stated that it was delivered to him by the superintendent registrar, that he examined it with the book at the registrar's office, and that it is correctly extracted; which, as it seems to me, can mean nothing else than this, that he found in that book the words: "the Wesleyan chapel, situate at Dunstable, in the county of Bedford, was duly registered for the solemnization of marriages therein, pursuant to the act 6 & 7 Will. 4, c. 85, on the 28th day of November, 1845." The document, therefore, appears to me to be an examined extract from the registrar's book; and it, consequently, proves the chapel to have been duly registered.

WIGHTMAN, J.—I confess that I entertained some doubt at the trial as to the admissibility of the document marked B., and I still have considerable doubt about it; but, independently of that document, I think that there was *primâ facie* evidence of the place having been duly registered. The presence of the registrar at the marriage, the manner in which the ceremony was dealt with, the entry of the marriage in the registrar's book, and the production of the extract from that book seemed to me at the time to be circumstances which afforded, and I now think that they do afford, *primâ facie* evidence that this chapel was a duly registered place, more particularly as, if it were not, all the parties who took part in the proceeding would be criminally liable for doing so. At the same time I cannot help saying that it is very unfortunate that there should be so much difficulty in discovering a ready mode of proving marriages contracted in Dissenting chapels.

WILLIAMS, J.—I have seen no reason to withdraw from the position which I presented to the learned counsel for the prisoner at an early stage of the argument. This marriage took place in a chapel under such circumstances that the person who was present

and professed to act as registrar was authorized to do so, if the chapel was duly registered; but if the chapel was not registered, it would have been illegal for him so to act; and, it seems to me that we must presume that his conduct was legal; and, that, in such a case, no more evidence is necessary to prove the validity of the marriage than is required when parties come to the parish church and are married there. It is unnecessary to give an opinion as to the admissibility of document B.; but I must protest, for myself, against the soundness of the notion that, in any proceeding, when the production of the original document may be dispensed with, the parties are tied down to any particular mode of secondary proof.

WILLES, J.—There seems to be some question whether the rule that there are no degrees in secondary evidence applies to the case of public documents. In *Mortimer v. McCallan* (6 M. & W. 67), Lord Abinger, referring to previous decisions, with respect particularly to the books of the Bank of England, lays it down as established law, that they, “being of great concernment to the whole of the national creditors, the removal of them would be so inconvenient that copies of them might be received in evidence;” and Baron Alderson uses similar language. It seems that a notion certainly has existed that, as to public documents not removable, they ought to be proved by a copy; but it is unnecessary now to consider whether any such distinction exists. In this case I apprehend that document B. is a copy, and an examined copy; and it is a mistake to treat the provision of 14 & 15 Vict. c. 99, as more than cumulative. Further, I think, upon the other facts proved, the performance of the ceremony in the presence of the proper public officer, and the registration of the marriage, there is evidence (even by way of admission on his part) of a legal marriage. (d)

WATSON, B.—I am of the same opinion, I do not found my judgment on document B., though I have a strong opinion that it was well proved; but I found it on this—that a witness having proved that the marriage took place before a public officer appointed for the purpose, and that it was duly entered in the register, we are bound to presume that everything was rightly done, and that, consequently, without document B. there was abundant evidence of a legal marriage in a legally authorized place.

Conviction affirmed. (e)

(d) In the case of Henry Wood, tried for bigamy at Lincoln during the winter assize, 1856, where the first marriage took place in a Roman Catholic chapel, Willes, J. referred to *R. v. Mainwaring*, as a decision, that no further evidence was now required to prove a marriage in a dissenting chapel than in a parish church.

(e) In *Campbell v. Corley*, in the Privy Council (28 L. T. 109), Dr. Lushington in delivering the judgment of the court, said: “The objection raised by the counsel for the appellant is, that the marriage did, in point of fact, take place at the registrar’s office, but that it ought to have been alleged in the pleadings and proved in evidence, that it took place in the presence of two witnesses, and with open doors, which it is contended neither the pleadings nor evidence show to have been the case. We must, in the first instance, presume that when a marriage has been celebrated in the presence of the registrar and deputy-registrar, unless the contrary appears, the requisites of the statutes have been complied with, and we must see whether there is any evidence to rebut that presumption of law.”

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COURT OF CRIMINAL APPEAL.

November 15, 1856.

(Before POLLOCK, C. B., ERLE and WILLES, JJ., BRAMWELL and WATSON, BB.)

REG. v. MOSS. (a)

Cheating at cards—Stat. 8 & 9 Vict. c. 109—Form of indictment—Averment of property.

In an indictment under 8 & 9 Vict. c. 109, s. 7, for cheating at cards, it is not necessary to allege whose money is won:

Quære, whether under that statute it is necessary, to constitute the offence, that any money should be actually obtained.

AT the Quarter Sessions for the county of Berks, held on the 30th of June last, William Moss was indicted under the 7th section of the act of the 8 & 9 Vict. c. 109, which section is as follows:—

“And be it enacted that every person who shall by any fraud or unlawful device, ill-practice in playing at or with cards, dice, tables or other games, or in bearing a part in the stakes, wagers or adventures, or in the betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise, win from any other person to himself or any other or others any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence, with intent to cheat or defraud such person of the same, and being convicted thereof, shall be punished accordingly.”

The indictment was in the words following, that is to say—

“Berks, to wit.—The jurors for our Lady the Queen, upon their oath present, that William Moss, on the 9th day of June, in the year of our Lord 1856, by fraud, unlawful device and ill-practice in playing at and with cards, unlawfully did win from one Henry Fitzgerald Bernard to a certain person, whose name is to the jurors unknown, a certain sum of money, with intent to cheat him, the said Henry Fitzgerald Bernard, to the evil example of all others in the like case offending, against the form of the statute

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

in that case made and provided, and against the peace of our Lady the Queen, her crown and dignity."

The jury, upon the trial of the above indictment, returned a verdict of guilty against the defendant, whereupon Mr. *Metcalf*, counsel for the defendant, moved the court in arrest of judgment, that the said indictment was bad for not alleging that the money won by the said William Moss was the money of the said Henry Fitzgerald Bernard; and he cited the case of *Sill v. The Queen* (1 Ell. & Bl. 553.) The Court of Quarter Sessions overruled the said objection, but reserved the point on the validity of the said indictment for the consideration of this honourable court, and gave judgment that the defendant be imprisoned and kept to hard labour for six calendar months, but they respited the execution of the said judgment until this court shall have decided upon the validity of the said indictment; and they discharged the defendant upon recognizances of bail conditioned to appear and render himself in execution if this honourable court shall be of opinion that the above judgment be affirmed.

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The question submitted for the opinion of the court is, whether the judgment upon the said conviction shall be arrested by reason of the alleged defect in the said indictment.

Metcalf for the prisoner.—There is no distinction between an indictment under the 8 & 9 Vict. c. 109, s. 7, and an ordinary indictment for false pretences, so far as the point in question is concerned; and all the cases show that an indictment for false pretences is bad unless it avers whose property was obtained: (*Sill v. The Queen*, 1 Ell. & Bl. 553; *R. v. Norton*, 8 Car. & P. 196; *R. v. Martin*, 8 Ad. & Ell. 481; *R. v. Marsh*, 1 Den. C. C. 505.) The same rule has been applied even to indictments for conspiracy, where the conspiring is the gist of the offence: (*R. v. Parker*, 3 Q. B. 292.)

BRAMWELL, B.—But the offence under the statute 8 & 9 Vict. c. 109, s. 7, is not the actual obtaining of any specific money or chattel, but the "winning" of money, that is of the right to have money; that is, an abstraction, not a thing in nature, with regard to which you may say whose property it is.

ERLE, J.—According to my recollection no money was actually obtained in the card-cheating cases at Brighton.

Metcalf.—Since Lord Campbell's Act the obtaining of specific coin need not be alleged in any indictment, but the property must be stated. No precedent can be found of an indictment without such an averment, and unless such an averment is required, the prisoner might be greatly embarrassed in making out a plea of *autrefois acquit* or *convict*, if he should be charged a second time with the same offence. Another reason assigned for the rule is, that without the averment the indictment does not show that it was not the prisoner's own money that was obtained.

WILLES, J.—That could hardly be so, consistently with the other averments in this indictment.

Metcalf.—At all events the question is settled by authority with

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respect to an indictment for false pretences, and this statute provides that a person offending against it shall be deemed guilty of obtaining by false pretences.

POLLOCK, C. B.—The indictment is sufficient, and the conviction right. The cases cited apply to indictments for obtaining money by false pretences; but not to an indictment under this statute. We need not now decide whether “win” means, as it does in some mining districts, actually obtain; for this indictment is framed upon the very words of the statute, and cannot lead to any ambiguity as to the precise offence charged.

ERLE, J.—I concur in the observations of the Lord Chief Baron; and I also think that it was a very salutary statute (*b*) which enacted that an indictment framed in the very words of the act creating the offence should be sufficient after verdict. I am aware that there are some cases in which that has been held not applicable; and I should feel myself bound by them if they were in point on the present occasion. But it seems to me that they are not, and as this indictment does follow the words of the statute, I hold it to be sufficient.

WILLES, J., and BRAMWELL and WATSON, BB., concurred.

Conviction affirmed.

(*b*) 7 Geo. 4, c. 64, s. 21. In Mr. Greaves's edition of Lord Campbell's Acts (p. 111), it is mentioned that the bill for further improving the administration of criminal justice (14 & 15 Vict. c. 100) “originally contained a clause making every indictment good, which charged an offence in the words of the statute; but this clause was struck out in the House of Lords, on the ground that it would make it unnecessary to set out any of the pretences in an indictment for false pretences; but,” adds Mr. Greaves: “it is by no means easy to see any good ground for holding an indictment good after verdict, which was insufficient before verdict.”

COURT OF CRIMINAL APPEAL.

November 15, 1856.

(Before POLLOCK, C. B., ERLE and WILLES, JJ., BRAMWELL and WATSON, BB.)

REG. v. LISTER.(a)

Embezzlement—Non-accounting.

On the trial of an indictment for embezzlement, it was proved that the prisoner's duty was to enter the money he received from his master's customers in various books, and pay the amount into a banker's. It was also his duty to enter the various accounts from these books into the ledger at his convenience. He received a sum of money from a customer and omitted to enter it in any of the books except the ledger; in that book, however, it was entered to the customer's credit. Instead of paying the money into the banker's he appropriated it to his own use.

Held, that the entry in the ledger was not such an accounting as would prevent him being guilty of the crime of embezzlement.

THE following case was reserved by Mr. Russell Gurney from the Central Criminal Court:—

At a General Sessions of Gaol Delivery, holden for the jurisdiction of the Central Criminal Court on the 18th day of August, 1856, Charles Lister was tried and found guilty before me, upon an indictment for embezzling and stealing the sum of 10*l.*, received by him by virtue of his employment on account of George William Petter and another, his masters.

The prisoner was employed by the prosecutors to attend to the business of their journal, called the *County Paper*, and to receive remittances in money from their customers in connection therewith. When the prisoner received these remittances, it was his duty to enter them to the credit of the customers in a day or cash book. Before the next time of sending cash to the banker's, it was the prisoner's duty to make an extract from this cash or day

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

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book of all remittances received by him as before mentioned, and which had not then been before paid to such banker's, and to take it to the general cashier of the prosecutors, in order that it might be compared with the book from which it purported to be an extract, so that thereby the amounts of remittances contained therein might be checked and ascertained to be correct. It then became the prisoner's further duty to enter the whole amount of money contained in such extract on the credit side of a banker's deposit account, and to pay such amount to the credit of the prosecutors with their bankers. The prisoner afterwards posted the amounts of money remitted by customers into a ledger, which contained the accounts of the different customers. This was done by the prisoner at his own convenience. As the prisoner was entrusted from time to time to furnish receipts to the customers from whom he received remittances, he was supplied with a receipt-book for that purpose containing counterparts, on each of which it was his duty to enter the amount for which the corresponding receipt had been given.

On the 7th of June the money, the subject of this indictment, was remitted by a customer from the country. It was received by the prisoner by virtue of his employment on the 8th of June, and on the 9th of June he sent the customer a receipt for the amount in the usual course.

This sum the prisoner never entered in the cash or day book, and although he ought, in the regular course of his employment, to have included it in an amount which he paid to the credit of the prosecutors with their bankers on the 9th of June following, he omitted to do so (nor was it entered in any subsequent account.) It was, however, entered by the prisoner to the credit of the customer in the prosecutors' ledger.

The money was applied by the prisoner to his own use.

The jury, with my full concurrence, found the prisoner guilty, subject to the following questions, viz., whether the entry made in the ledger exempts the prisoner from the operation of the statute 7 & 8 Geo. 4, c. 29, s. 47. And it is under these circumstances that the opinion of the Court for the consideration of Crown Cases is requested, in order that such conviction may be subjected to the order of such court.

Judgment has been postponed on the prisoner, and he remains in gaol till the determination of this case.

RUSSELL GURNEY.

Metcalfe (for the prisoner) contended that the entry in the ledger was a sufficient accounting; it was an acknowledgment by the prisoner that he had received the amount in question; it was made in his masters' book, to which the establishment had ready access, and if there was any evidence of an accounting in one book, it was no answer to that, to say there ought to have been entries in others. He charged himself with the receipt of the money within the case of *R. v. Hodgson*, 3 C. & P. 422.

POLLOCK, C. B.—But, not with the intention of giving his

master any information on the subject. On the contrary, it was done for the purpose of concealment. Since, if the customer asked for his account, and the payment did not appear to his credit in the ledger, detection must have immediately followed.

Metcalf, submitted that, at all events, it was a question for the jury, whether the prisoner had accounted or not, and, from the statement of the case, that point seemed not to have been submitted to them.

Robinson (for the prosecution) was not called upon.

POLLOCK, C. B.—We are all of opinion that there is nothing in the objection, and the conviction must be affirmed.

The rest of the judges concurred.

Conviction affirmed.

Robinson (for the prosecution.)

Metcalf (for the prisoner.)

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EXCHEQUER CHAMBER.

January 27, 1857.

(Before MARTIN, B., and WILLES, J.)

REG. v. PIERCE AND OTHERS. (a)

Property of a felon.

Circumstances under which the Court will make an order for restoration of the property stolen.

The practice of the Treasury is not to retain the property of a felon when any persons make out a good case for its restoration. Sometimes it is restored to the felon himself for good conduct, and sometimes to his wife. The Treasury always endeavours to act according to the equity of each case.

THE prisoners had been convicted of stealing bullion from the South Eastern Railway Company. Property to a large amount had been found in their possession. The supposed produce of the robbery had been converted into securities. An approver who had given evidence against them, and who was then under sentence for another felony, had deposited with one of the prisoners a large sum of money to be used for the maintenance of a woman with whom he had cohabited and her child, but which the prisoner had diverted to his own use, and was part of the property found in his possession.

Bodkin appeared for the Company; *Sleigh* for the sheriffs of London and Middlesex; *Petersdorff* for the attorney for prisoner *Pierce*.

Mr. *Beard* appeared for the wife of prisoner *Tester*.

Mr. *Reynolds*, solicitor to the Treasury, appeared on behalf of the Crown.

Sleigh contended that under the ancient charters granted to the corporation of the city of London the property of all felons convicted in the city was forfeited, and that the sheriffs, by virtue of their office, ought therefore to have the custody of all the property taken from the prisoner *Pierce*, he being a felon, and all his goods and chattels being thereby forfeited to the Crown; and the sheriffs, who were the custodians of the Crown, ought therefore to have possession of it. He said that from time immemorial the property of the prisoners convicted at the Old Bailey had been given up to the sheriffs in that capacity, and he believed this was the first time

(a) Reported by E. W. Cox, Esq., Barrister-at-Law.

that their rights in this respect had ever been contested. He went on to say that he was instructed that it was not the fact that Agar had placed the money he possessed in Pierce's hands for the benefit of Fanny Kay, but, in point of fact, he handed it to Mr. Wontner to be given to Betty Pierce, the wife of that prisoner, and that there was nothing to show that the whole proceeding was not collusive, with a view to defeat the title of the Crown to the property; and he urged that the Court had no power under such circumstances to order the property to be given to Fanny Kay. He then referred to the act of the 7th and 8th of George 4, cap. 57, which related to the power of the judges to order the restitution of stolen property, but he said that the property now in question was not only not a part of the stolen property, but a great portion of it was not even the proceeds of it, and he urged that the only course that ought to be taken was to place the property in the hands of the sheriffs, who would be responsible for its safe custody, and who would be ready to obey any order that the judges might eventually make respecting it.

Petersdorff claimed, on behalf of his client, a sum of 260*l.* for costs that had been incurred by Mr. Saward in conducting some legal proceedings for the prisoner Pierce.

Mr. *Beard*, on behalf of Mrs. Tester, claimed the property taken from him, and which consisted of certain Spanish bonds, upon a settlement made by the prisoner before his trial.

The JUDGES at once decided that neither of these parties had any legal claim. With regard to Mr. Saward, he could have no right to be paid his debt out of property to which the Crown had a title; and, with reference to Mrs. Tester, the bonds in question were distinctly made out to be the result of the proceeds of the stolen gold, and she therefore could claim no right to them.

Bodkin said that, on behalf of the Company, all he asked of the Court was, to order that the property, which was undoubtedly the produce of the robbery that had been committed upon them, should be delivered up. They had paid 10,000*l.* as the value of the gold that had been stolen, and the company only desired that they should be treated like other prosecutors, and have restored to them that which was clearly made out to be the produce of the stolen property. He then said that it was proved at the trial that 500*l.* of the purchase money of the Turkish bonds was the result of five of the 100*l.* notes that were obtained for gold at the Bank of England, and about 400*l.* more that were in the hands of Messrs. Reid, the brewers, with whom it had been placed by Mr. Stearn, the publican, on behalf of Burgess. These two sums were clearly shown to have been the produce of the gold that was sold by Pierce and Agar, and which was divided among the prisoners, and it appeared to him that the company were clearly entitled to this money, and that the court should make an order for it to be delivered up to them.

Sleigh said he should not offer any objection to this amount being

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ing.

given to the company, but he contended that the sheriffs ought to have the custody of the remainder on behalf of the Crown.

WILLES, J., said that the sheriffs had not made out a case that would justify the Court in making the order they prayed for. They professed to be acting in the interest of the Crown, but the Solicitor for the Treasury was present, who was the direct party to interfere.

Mr. *Reynolds* said that under ordinary circumstances the property of a felon was taken possession of by the Crown, but it was never retained when any person made out a good case for its restoration. In some instances it had been restored to the felon himself for good conduct, and also to his wife, and the Treasury, in fact, always endeavoured to act according to the equity of each case.

MARTIN, B., expressed his opinion that Fanny Kay had an equitable right to the property, according to the request of Agar.

Bodkin, on the part of the Company, had no interest, except in that portion of the property which was proved to be the produce of the robbery; but he suggested that, if the remainder were to be given to the woman Kay, the interests of the child ought to be taken care of, and that a proper settlement should be made for that purpose.

Sleigh.—If Mr. *Reynolds* would take charge of the property, and see that it was distributed in the manner that had been suggested, he would at once, on the part of the sheriffs, withdraw from making any further claim.

Mr. *Reynolds* intimated that he was not anxious to undertake the responsibility of distributing the property.

Sleigh said that surely the Court would not think it decent, or in accordance with the due administration of justice, that a large sum of money like this should be retained in the hands of a policeman; and that it would be a much more decorous proceeding for the property to be placed in the hands of the sheriffs.

Bodkin understood that the City actually claimed the money, and if the bonds went into their possession they would set up their rights in this respect, and the greater portion of the property would be wasted in law.

Sleigh said he was instructed that no such claim was intended to be set up. The sheriffs only desired to assert what they conceived to be their rights.

MARTIN, B.—The sheriffs appeared to have acted very properly in the matter, but he did not think they had made out their right to have the property placed in their custody.

Eventually their Lordships made an order that the company should have restored to them so much of the property as was shown to be the result of the robbery, and that the remainder should be given into the custody of Sir Richard Mayne, the Chief Commissioner of Police, to abide any future orders that may be given respecting it.

COURT OF CRIMINAL APPEAL.

January 24, 1857.

(Before POLLOCK, C.B., WIGHTMAN and WILLES, JJ.,
MARTIN and WATSON, BB.)

REG. v. WM. REANEY AND JAS. REDDISH. (a)

Evidence—Admissibility of dying declaration.

Upon the trial of an indictment for manslaughter, a statement made by the deceased respecting the manner in which, and the persons by whom, the injuries had been inflicted, was received in evidence. The statement concluded with these words:—"I have made this statement believing I shall not recover;" and at that time he was in such a state that his death must speedily follow; and he died seven days afterwards. But it appeared also, that shortly before he made the declaration he had said to a constable, who asked him how he was:—"I have seen Mr. Booker, the surgeon, to-day, and he has given me some little hope that I am better, but I do not myself think that I shall ultimately recover." Afterwards, on the same occasion, he said he could not recover.

Held, that there was sufficient evidence that the statement was made under a consciousness of impending death to justify its reception in evidence.

Per MARTIN, B.—The admissibility of the statement as a dying declaration depends upon whether the judge at the trial is satisfied that it was made under a sense of approaching death.

THE following case was reserved by Willes, J.:—

The prisoners were convicted before me at the Winter Gaol Delivery for the County of Derby, for the manslaughter of another William Reaney, by injuries inflicted on the 11th October last. Part of the evidence consisted of a dying declaration, in the following terms:—

The statement (which bore date October 23rd) was set out at length in the case. It detailed minutely the circumstances connected with the attack made by the prisoners upon the deceased, and described the manner in which the injuries had been inflicted upon him. But no part of it is material to the decision, except the concluding paragraph, which was in these words:—

"I have made this statement, believing I shall not recover."

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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tion.

At the time the declaration was made the deceased was in a state from the injuries which he received, from which it was impossible that he could recover. His spine was broken in such a manner, that death must speedily have followed; and he died on the 3rd of November.

The objection to the reception of the evidence was founded upon part of the evidence of John Gillott, a constable, who stated that he had seen the deceased man on the same day that he made the declaration, and shortly before he made it; and upon asking him how he was, the deceased answered, "I have seen Mr. Booker, the surgeon, to-day, and he has given me some little hope that I am better; but I do not myself think I shall ultimately recover."

The same witness stated, that before he left the room, on the said occasion, the deceased said that he could not recover.

I admitted the evidence, reserving the point for the consideration of the Court for Crown Cases Reserved, and I left the prisoners in custody.

D. Seymour for the prisoner.—No sufficient evidence was adduced on the part of the prosecution to render the statement of the deceased admissible as a dying declaration. The principle on which such declarations are received, is stated by Eyre, C.B., in *Woodcock's case* (1 Leach, 500), to be, "that they are declarations made in extremity, when the party is at the point of death, and when every hope in this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful consideration to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice;" and the same learned judge adds, that though in fact made by a person in a dying state, they are inadmissible, "unless it also appear that the deceased himself apprehended that he was in such a state of mortality as would inevitably oblige him soon to answer before his Maker for the truth or falsehood of his assertions." In the *Susssex Peerage case* (11 Cl. & Fin. 108), the rule is laid down in terms no less stringent; and in Professor Greenleaf's Book on Evidence, p. 189, it is said: "It is essential to the admissibility of these declarations, and is a preliminary fact to be proved by the party offering them in evidence, that they were made under a sense of *impending death*." And, again: "It is the *impression of almost immediate dissolution*, and not the rapid succession of death in point of fact, that renders the testimony admissible." So in 2 Russ. on Crimes, 756, the rule is thus expressed: "In order to render a dying declaration admissible, it must be shown to have been made under such circumstances as necessarily exclude the supposition that the deceased might at the time entertain *some* hope of recovery." And it is added: "The absence of any settlement of affairs; of directions as to his funeral; of taking leave of his friends and relations, and such like, tends to show that all hope of recovery is not vanished from the mind, and may sometimes exclude a dying declaration." In 1 Taylor on Evidence, 474

(1st ed.), it is said, "belief that he will not recover is not in itself sufficient, unless there be also the prospect of almost 'immediate dissolution.'"

POLLOCK, C.B.—Is any authority cited for that position?

D. Seymour.—*R. v. Van Butchell*, 3 Car. & P. 629.(b) Now in the present case the evidence falls far short of the requirements mentioned in these various authorities. There is no evidence whatever of any expectation of immediate or impending dissolution; on the contrary, it is quite consistent with the expressions used by the deceased, that though he did not expect ultimately to recover from the effects of the injury, yet that he did expect to live for some considerable time. Beyond his own expressions, there is no evidence at all. There are in this case none of the usual circumstances attending a dying declaration, such as settlement of affairs, leave-taking of friends, and the like; and the use of the word *ultimately*, with reference to his recovery, imports rather that he anticipated a lingering illness.

WIGHTMAN, J.—What interval of time must be contemplated?

D. Seymour.—The line cannot be drawn with nicety as to the number of hours or days; but it must be clearly established that the deceased believed that his death was about shortly to take place. *R. v. Mosley* (1 Moo. C. C. 97) may be relied upon for the prosecution; but in that case it appeared that the deceased had not only said that he should never get better, but also that he would not continue long, and that a few days would finish him. There was, therefore, the expectation of speedy dissolution.

WIGHTMAN, J.—In this case the patient appears to have had no hope, though the doctor had given him some reason to hope.

WILLES, J.—In fact, the surgeon entertained none at the time when the declaration was made, but he desired to keep up the spirits of his patient.

D. Seymour.—*R. v. Howell* (1 Car. & K. 689) is also a totally different case. In that case there were nearly all the circumstances indicative of a consciousness of approaching death, except that the deceased, being a Roman Catholic, had put off sending for a priest to administer to him the last religious offices. In *R. v. Spilsbury* (7 Car. & P. 187), where the circumstances were quite as strong as they are here, the evidence was rejected by Coleridge, J.

O'Brien (Bell with him) for the prosecution, was not called upon.

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(b) *Van Butchell's case* seems so closely in point that it must be considered as overruled by the decision in the principal case. In that case the deceased had said to the surgeon, "I feel that I have had such an injury in the bowel, that I think I shall never recover." The surgeon endeavoured to encourage him, as his symptoms were not then such as to lead the surgeon to consider him in danger of dying, but his expression was that he felt satisfied that he should never recover. This was on the 10th May, and the death took place on the 17th. Hallock, B.—"The principle on which declarations *in articulo mortis* are admitted in evidence, is, that they are made under an impression of almost immediate dissolution. A man may receive an injury from which he may think that he shall *ultimately never recover*, but still that would not be sufficient to dispense with an oath."

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ation.*

POLLOCK, C.B.—I believe we are all of opinion that it is unnecessary to hear the other side, and that the conviction is right. In order to render such a declaration admissible, it is necessary that it should be made under the apprehension of death. The books certainly speak of near approaching death; but there is no case in which any particular interval, any number of hours or days is specified as the limit. In truth, the question does not depend upon the length of interval between the death and the declaration, but on the state of the man's mind at the time of making the declaration, and his belief then that he is in a dying state. Now, in this case, it appears that there was no chance of recovery. The man's spine was broken in such a manner that his death must have speedily followed, and it did happen on the 3rd November. That being his actual condition, he says, "I make this declaration, believing I cannot recover." It appears, however, that about the same time he saw a constable, to whom he repeated a statement which had been made to him by the surgeon, not because the surgeon himself believed it, but for the purpose of encouraging his patient, and to assist nature, but the patient himself was not deceived; he still thought that he could not recover. The *post-mortem* examination afterwards disclosed that his recovery was impossible; the man was in a dying state; and the nature of the injury was such that the sufferer was very likely to be a better judge of his actual condition than even the doctor. There can be no doubt that the deceased was suffering under an injury which must soon terminate fatally; that he, as well as the doctor, was conscious of it; and that he made the declaration under that belief, which the facts show to have been well founded. Under these circumstances it appears to me that the declaration was properly received.

WIGHTMAN, J.—I am entirely of the same opinion. I agree that in order to make such a document admissible, the statement must have been made under an impression upon the mind of the person making it, that his death was about to happen shortly, or to use the expression found in the books, that his death was impending. That, however, is a relative term, and does not of course import merely an expectation that the sufferer would die at some time, for that is the debt which we all owe to nature; but it means an expectation that he is about to die shortly of the disease or injuries from which he is then suffering; that, in other words, he is without a reasonable or any hope of recovery. Then what are the circumstances of the present case? He was in a state from the injuries received, which rendered it impossible that he should recover. His spine was broken so that his death must speedily happen. That was his status, and his own opinion is that he cannot recover. He says that he had seen the doctor, who had given him some little hope, but still he did not think he should ultimately recover; and again, on the same occasion, he said to the constable that he could not recover. That is his own opinion of his case; and it seems to me that the impression on his mind cer-

tainly was that his death was so near at hand, as that it might be said to be impending.

MARTIN, B.—I am of the same opinion; but I also think that the admissibility of such a statement depends upon whether the judge who tries the case is satisfied that the man believed he could not recover. It is a question for the judge at the trial.

WILLES, J.—I reserved this case in consequence of the strong opinion expressed upon the point by the learned counsel who defended the prisoners; but I myself think it perfectly clear that the declaration was admissible. There certainly was a period of time during which the surgeon was not aware of the extent or nature of the injuries which the deceased had received, and during which he thought that he might recover; but at the time when this declaration was made the surgeon was quite of opinion that the man could not recover, and the *post-mortem* examination showed that recovery was impossible. It was equally clear that the man's own opinion was that he could not recover; but at the trial reliance was chiefly placed on the word "*ultimately*," and it was said that, consistently with that expression, he might expect to live for a long time; but looking at all the circumstances, it does not appear to me that it can be so understood in this case; and the cases collected in Archb. 192, which were referred to, are not at variance with this decision.

WATSON, B.—Looking fairly at the whole of what was stated by the deceased, I come to the conclusion that he made that statement under the influence of an expectation of impending death.

Conviction affirmed.

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COURT OF CRIMINAL APPEAL.

January 31, 1857.(Before POLLOCK, C.B., ERLE and WILLES, JJ., and
BRAMWELL and WATSON, BB.)

REG. v. GEORGE BRERETON SHARPE. (a)

*Misdemeanor—Removal of a corpse from a burial ground belonging to a congregation of dissenters.**It is an indictable misdemeanor at common law to remove without lawful authority a corpse from a grave in a burying-ground belonging to a congregation of Protestant Dissenters, although the motive of the person so acting may be pious and laudable.**So held, in a case where a son, from motives of filial affection and religious duty, removed the corpse of his mother from a family grave in a dissenters' burial ground, for the purpose of its interment together with that of his father, in a consecrated churchyard.***T**HE defendant was tried at Hertford, before Erle, J., who reserved the following case:—

The indictment in the first count charged that the defendant a certain burial-ground belonging to a certain meeting-house of a congregation of Protestants dissenting from the Church of England unlawfully did break and enter, and a certain grave there, in which the body of one Louisa Sharpe had before then been interred, with force and arms, unlawfully, wilfully and indecently did dig open, and the said body of the said Louisa Sharpe out of the said grave, unlawfully, wilfully and indecently did take and carry away.

And there were other counts, varying the charge, which may be resorted to if necessary. The evidence was, that the defendant's family had belonged to a congregation of dissenters at Hitchin, and his mother, with some other of his relations, had been buried in one grave in the burying-ground of that congregation there, with the consent of those who were interested. That the father of the defendant had recently died. That the defendant prevailed on the wife of the person to whom the key of the burying-ground was intrusted, to allow him to cause the grave above mentioned to be opened, under the pretext that he wished to bury his father in the same grave, and, in order thereto, to examine whether the size of the grave would admit his father's coffin.

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

That he caused the coffins of his stepmother and two children to be taken out, and so came to the coffin of his mother, which was under them, and was much decomposed, and that he caused the remains of this coffin, with the corpse therein, to be placed in a shell, and carried to a cart near the burying-ground, and driven therein some miles away towards a churchyard, where he intended to bury his father's corpse with the remains of his mother.

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These acts were done without the knowledge or consent of the congregation to whom the burying-ground belonged, or of the trustees having the legal estate therein. The person having the keys of the ground was induced to admit the defendant into the ground and to the grave by reason of the pretext that the defendant intended to bury his father there, and the jury found that this was only a pretext, and that his real intention from the beginning was to remove his mother's corpse.

But the defendant acted throughout without intentional disrespect to any one, being actuated by motives of affection to his mother and of religious duty. I directed the jury to convict if they believed these facts to be true, and reserved for the decision of this court the question whether the conviction could be sustained. Accordingly, a verdict of guilty was entered, and the defendant was discharged on his recognizance to appear if called on.

This case came on for argument on Saturday, November 15, before Pollock, C.B., Erle, J., Willes, J., Bramwell, B., and Watson, B.

The defendant in person argued that the conviction was wrong. He considered that the grave was the private property of his family; and there had been no indecorum or improper motive in his proceedings. He alluded to the circumstance that the bodies of many illustrious persons had, at various times, been removed from one place of interment to another.

No counsel appeared for the Crown.

Cur. adv. vult.

ERLE, J., now delivered the judgment of the court.—We are of opinion that the conviction ought to be affirmed. The defendant was wrongfully in the burial-ground, and wrongfully opened the grave, and took out several corpses and carried away one. We say, he did this wrongfully, that is to say, by trespass; for the licence which he obtained to enter and open from the person who had the care of the place, was not given or intended for the purpose to which he applied it, and was, as to that purpose, no licence at all. The evidence for the prosecution proved the misdemeanor, unless there was a defence. We have considered the grounds relied on in that behalf, and although we all feel sensible of the estimable motives on which the defendant acted, namely, filial affection and religious duty, still neither authority nor principle would justify the position that the wrongful removal of a corpse was no misdemeanor, if the motive for the act deserved approbation. A purpose of anatomical science would fall within that

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category. Neither does our law recognise the right of any one child to the corpse of its parent, as claimed by the defendant. Our law recognises no property in a corpse, and the protection of the grave at common law, as contradistinguished from ecclesiastical protection to consecrated ground, depends on this form of indictment, and there is no authority for saying that relationship can justify the taking of a corpse from the grave where it had been laid. We have been unwilling to affirm the conviction on account of our respect for the motives of the defendant; but we have felt it our duty to do so rather than lay down a rule which might lessen the only protection the law affords in respect of the burials of dissenters. The result is, the conviction will stand, and, as the Judge states, the sentence should be a nominal fine of one shilling.

Conviction affirmed (b).

(b) In *R. v. Lynn* (2 T. R. 733; 1 Leach 497) it was held indictable as a misdemeanor to take up a dead body for the purpose of dissection. Upon motion in arrest of judgment it was argued that if it were any crime, it was one of Ecclesiastical cognizance only; but the court answered "that the offence was cognizable in a criminal court, as being highly indecent and *contra bonos mores*; at the bare idea alone of which nature revolted. That the purpose of taking up the body for dissecting did not make it less an indictable offence: and that, as it had been the regular practice of the Old Bailey, in modern times, to try charges of this nature, many of which had induced punishment, the circumstance of no writ of error having been brought to reverse any of these judgments was a strong proof of the universal opinion of the profession upon this subject; and they therefore refused even to grant a rule to show cause, lest that alone should convey to the public an idea that they entertained a doubt respecting the crime alleged." (See also *R. v. Cundick*, D. & R. N. P. C. 13; *R. v. Duffin*, R. & R. 365; and *R. v. Gilles*, ib. 366, note (b).)

COURT OF CRIMINAL APPEAL.

November 22, 1856.(Before POLLOCK, C.B., COLERIDGE, WILLIAMS, and WILLES,
JJ., and WATSON, B.)

REG. v. KEIGHLEY. (a)

*False pretences—Evidence—Imperfect statement of case for the opinion
of this court—Conviction quashed.**An indictment charged that the defendant knowingly falsely pretended that a horse was sound, and that he himself was a farmer at O., negating both pretences in the usual way. The defendant was convicted, but a case was reserved in which, after stating that the false representations were made, and the money obtained as alleged, and that the defence was, that this was a case of giving a false warranty, and therefore not indictable, the question was put whether the conviction could be sustained. The court having directed an amendment of the case, the facts proved at the trial were set out more specifically; but it was not stated as a fact that the defendant knew the horse to be unsound, though evidence was stated from which that inference might be drawn; nor was it stated what direction the chairman had given to the jury.**Held, that as the case was framed, the conviction must be quashed; as the court, not knowing what direction had been given to the jury, could not answer the question put to it in the affirmative; and as it was consistent with the case that the jury might have been told that even if the defendant did not know that the horse was unsound, he might be convicted upon the other false statement alone.*

THE following case was reserved at the Wakefield Sessions:—
The defendant was tried at the adjourned sessions, held at Wakefield, on the 28th day of August, 1856, and convicted on the count in the indictment set forth below.

West Riding of Yorkshire, } The jurors for our Lady the Queen,
to wit. } upon their oath present, that John
Keighley, late of Wakefield, in the West Riding of the county of York, labourer, on the 18th day of April, in the year of our Lord, 1856, at Bradford, in the said West Riding of the county of York, unlawfully, knowingly, and designedly did falsely pretend to one

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David Balmford that a certain horse which he the said John Keighley then had at the Nelson Inn, in Bradford, in the riding aforesaid, was sound, and that he the said John Keighley would warrant him to anybody; and that the said horse was as sound as it was possible for a horse to be; that he the said John Keighley came from Otley, and that he was a farmer at Otley, and that a certain person then and there with him, whom he called Ben, was his man, and that he, Ben, had worked the horse for a month; by means of which said false pretences the said John Keighley did then and there unlawfully obtain from the said David Balmford a certain horse, the property of him the said David Balmford and others, his partners, and also the sum of 9*l.* 10*s.* &c., with intent to defraud. Whereas, in truth and in fact, the said horse was not then sound, nor was it then as sound as it was possible for a horse to be, as alleged by the said John Keighley, and as he the said John Keighley well knew. And whereas, in truth and in fact, the said John Keighley did not then come from Otley, and was not then a farmer at Otley, to the great damage and deception of the said David Balmford, to the evil example of all others in the like case offending; against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

It appeared in evidence that the defendant made the representations, and obtained the 9*l.* 10*s.* and another horse from the prosecutor, as stated in the indictment.

That the defendant was not a farmer at Otley, but a horse-dealer at Leeds. That the prosecutor being himself no judge of horseflesh, was influenced by his belief that the defendant was a farmer, to receive the horse of the latter, and part with his own and his money more readily than he would have done had he known the defendant to be a horse-dealer.

It was proved by a veterinary surgeon that the defendant's horse was decidedly unsound, being affected by glanders, a highly contagious disease, the worst known to him among horses, rendering the animal dangerous to touch, and not worth twopence.

That in his opinion the disease must have been of six months' duration, and evident during that time to any one engaged about the horse. That there are means, by the application of which the discharge characteristic of the disease may be arrested for a short time, so as to deceive an ignorant person.

But there was no direct evidence that such means had been employed in this instance.

For the defence it was contended, that the giving a false warranty for a horse is not an indictable offence: (*R. v. Pywell*, 1 Starkie N. P. C. 402.)

That such warranty being the principal false pretence in this case, an indictment would not lie.

There was a second count, charging the defendant with conspiracy, but the jury found him guilty on the first count, for obtaining by false pretences. Your opinion is requested as to whether, considering the whole of the circumstances under which the

warranty was given, with the subsidiary false pretence as to the defendant's being a farmer, the conviction can be sustained. Judgment is respited until your opinion is obtained. The defendant is out on bail.

A. J. Johnston for the prosecution.(b.)—The conviction is right. *R. v. Pywell* (1 Stark. N. P. C. 402) was a case of conspiracy; and all the more recent cases show that it matters not whether the money is obtained through the medium of a contract, if the whole transaction is grounded in fraud: (*R. v. Kenrick*, 5 Q. B. 49, 62; *R. v. Roebuck*, ante, p. 126; *R. v. Burgon*, ante, p. 131.) This is a stronger case than any of those, because it is stated here that the horse was really worthless.

COLERIDGE, J.—It is material to know whether a legal warranty was in fact given or not.

POLLOCK, C.B.—Yes; the case ought certainly to state under what circumstances the bargain was made.

BRAMWELL, B.—If a warranty was not given, it would be a stronger case.

The Court then ordered the case to be amended.

The case was amended by the addition of the following particulars:—

It appeared in evidence that on the 18th day of April, 1856, the defendant came to the prosecutor, at Bradford, and said, "I have heard at the Nelson Inn, that you are in want of a good strong horse, suitable for leading wood, or anything else. I have got one at the Nelson Inn of that sort, and if you can make it convenient to look in any time this afternoon do so." That the prosecutor went that afternoon to the Nelson Inn, and there saw the defendant and a person called Benjamin, who the defendant said was "his man;" and who, together with the defendant, showed the prosecutor a horse. That upon the prosecutor professing himself "no judge of horseflesh," and asking if the horse was sound, the defendant said as sound as possible for a horse to be.

That the man called Benjamin then and there said, in the defendant's presence, "The horse is sound. I worked him myself, along with another, a month." That upon the prosecutor's observing that the horse seemed not right about the nostrils, the defendant said he has got a bit of a cold, a little linseed will cure that.

That the defendant said at the same time, I am a farmer at Otley, and gave a name as his which was not his true name, nor yet a nickname by which he was usually known.

That upon these representations the prosecutor gave 9*l.* 10*s.*, and another horse, the property of himself and his brothers, in exchange for the defendant's horse.

That but for the statement about the horse being as sound as possible, and the defendant being a farmer at Otley, the prosecutor would not have bought the horse.

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KEIGHLEY.

1856.

*False pretences
—Imperfect
statement of
case.*

(b) November 15.—Coram Pollock, C. B., Coleridge and Willes, JJ., and Bramwell and Watson, BB.

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—
False pretences
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statement of
case.

The opinion of the Court of Appeal is requested as to whether, considering the whole of the circumstances detailed, the conviction can be sustained.

Judgment is respited until the opinion of the Court of Appeal be obtained. The defendant is out on bail.

A. J. Johnston. (c)—Upon the facts as they now appear, there was no warranty in point of law, or it is uncertain whether there was or was not; and even if there was a warranty, still the conviction may be sustained.

POLLOCK, C.B.—Suppose the prisoner did not know that the horse was glandered. It is not stated in the case that he did know. Do you contend that the false statement as to his being a farmer would bring him within the statute?

A. J. Johnston.—Probably that alone would not be sufficient.

WILLIAMS, J.—It would be all right if the chairman directed the jury that they could not find the prisoner guilty, unless he knew that the horse was glandered.

A. J. Johnston.—The chairman has stated to the court all that he can state.

POLLOCK, C.B.—If the question put to us was whether there was evidence to go the jury, I should say, yes, if they were properly directed, but how can I tell that they were properly directed. When the case was before us on the last occasion, I thought it too loose to say that the allegations in the indictment were proved; and I wished that the facts should be stated, in order that we might see whether the case came within the statute, which, in my opinion, was not intended to apply to any real transaction of buying and selling. But looking at the case as it now stands, unless the chairman can state the facts more specifically, and the way in which they were left to the jury, we are not in a situation to say whether the conviction was right or wrong.

WATSON, B.—There is very slight evidence of knowledge that the horse was glandered.

A. J. Johnston.—It lies upon the prisoner to make out that the conviction is bad.

COLERIDGE, J.—Then if the onus is upon him, and he does not appear, we have nothing to do but to affirm the conviction?

WILLES, J.—It is consistent with this case that the jury were told that it was enough to justify a conviction, if they believed that he knowingly made the false statement that he was a farmer.

POLLOCK, C.B.—The question put to us, is whether the conviction can be sustained. Now we cannot see upon what ground it proceeded; therefore it cannot be sustained.

WILLES, J.—All that we can say is, that it does not appear that he was rightly convicted.

Conviction quashed.

(c) November 22.—Coram Pollock, C. B., Coleridge, Williams, and Willes, JJ., and Watson, B.

COURT OF CRIMINAL APPEAL.

January 31, 1857.

(Before POLLOCK, C. B., WIGHTMAN and CRESSWELL, JJ.
and MARTIN and WATSON, BB.)

REG. v. GORBUTT. (a)

Embezzlement—Larceny—Evidence—Stat. 14 & 15 Vict. c. 100, s. 14.

A. was employed as cashier by B. It was his duty to receive money, to enter it in a cash-book as coming from the customers by whom it was paid, and to keep safely for the use of his master so much as was not lawfully disbursed by him. He was not required to keep the moneys so received distinct in specie, but he was responsible for the aggregate, forming one cash balance, allowing for his disbursements. Payments were made by customers to B. himself or to other persons in his employment, and the sums were handed over to A. either by B. or those other persons. On eight occasions A. had entered in his cash-book less than the amount actually received from the customer, and accounted for the difference by entering an allowance of discount to the customer larger than the amount actually allowed; but he credited the customer in the ledger with the correct amount. On several occasions, also, he had misadded his cash-book, so that the total of receipts at the foot of the page appeared less, and the total of disbursements more than it ought to have appeared. A deficiency to a considerable amount was shown upon a balance of his accounts. A. being indicted for larceny of money from his masters, was convicted of that offence; but upon a case reserved:

Held, that there was abundant evidence of embezzlement, but no evidence of larceny: and that although upon the indictment for larceny there might have been a conviction for embezzlement, under 14 & 15 Vict. c. 100, s. 14, yet the conviction for larceny, not being warranted by the evidence, must be quashed.

AT the General Quarter Sessions of the Peace for the county of Lancaster, holden by adjournment at Preston, the 2nd day of July, 1856, before F. B. Addison, Esq., chairman, and others, justices, William Gorbutt was tried upon an indictment, of which the following is a copy:—

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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Lancashire, } The jurors, &c., present, that William Gorbutt, late
to wit. } of, &c., on the 30th day of April, A.D. 1856, at, &c.,
was servant to William Acroyd and another, and that the said
William Gorbutt being, and whilst he was such servant as afore-
said, to wit, on, &c., at, &c., certain money, to wit, to the amount
of 300*l.*, the property of the said William Acroyd and another,
his masters as aforesaid, from the said William Acroyd and
another, his said masters, feloniously did steal, take and carry
away; against the form of the statute, &c.

Second count.—In the same form, for another larceny alleged to
have been committed within six calendar months after the time of
the committing of the said offence charged in the first count.

The following facts appeared in evidence:—

The prisoner entered the service of the prosecutors, William
Acroyd and William Farrar Acroyd, in July, 1855. On the 4th of
February, 1856, he was appointed their cashier, and he was their
servant in that capacity during the transactions hereinafter men-
tioned. It was his duty, as cashier, to receive moneys payable to
the prosecutors, to enter such moneys in his cash-book as coming
from the respective customers, by whom they were paid, and safely
to keep, for the use of the prosecutors, the said moneys, or so much
thereof as was not lawfully disbursed by him on their account.
He was not required to keep distinct from each other in specie the
respective sums received from the several parties making payments,
but the aggregate of the said sums (less by the prisoner's disburse-
ments) formed one cash balance, for which he was responsible to
the prosecutors.

It was likewise his duty to keep the ledger, wherein each cus-
tomer was debited with such demands as the prosecutors had
against him, and credited for his payments to the prosecutors. On
several occasions after the 4th of February, 1856, payments were
made by customers to each of the prosecutors, and to other persons
in their employ.

Shortly after each of such payments the money was, by the
person so receiving the same, handed over to the prisoner as cashier,
and as a payment made by such respective customer to the prose-
cutors. It was the prisoner's duty to debit himself in his cash-
book with every such payment, and credit the customer with such
payment in the prosecutors' ledger.

The prosecutors, by themselves, or one of them, examined the
prisoner's accounts occasionally.

The prosecutor, William Farrar Acroyd, examined them on
Saturday, the 31st May, 1856, when the prisoner produced his
cash-book, showing that there should be then in his hands a balance
of 360*l.* 12*s.* 4½*d.*, which amount the prisoner then stated was the
real balance then due from him to the prosecutors. He further
stated that he then had in his hands, on account of the prosecutors,
356*l.* 17*s.* 10*d.*, which, with three small sums due to him from the
prosecutor, William Acroyd, made up the above balance, except
a small deficiency of threepence, and he produced the following

account of the money in his hands, and represented the same to be correct, viz. :—

	£	s.	d.
Bank of England Notes	265	0	0
Gold	52	0	0
Half-Crowns	25	17	6
Shillings	10	15	0
Sixpences and Fourpenny-pieces	3	5	0
Copper	0	0	4
Money owing by Mr. A.	1	5	6½
Ditto Ditto	1	2	11½
Ditto Ditto	1	5	9½
	<hr/>		
	£360	12	1½

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And the prisoner then produced and exhibited the bank notes and coin mentioned in such account, and the same was then left in his hands.

On Monday the 2nd day of June, 1856, the prosecutor, William Farrar Acroyd, observed that the prisoner had in his cash-book debited himself with a sum of 731*l.* 5*s.* 10*d.*, as a payment from Luccock, Lupton & Company, 19th May, 1856, whereas the true amount of such payment was 751*l.* 5*s.* 10*d.*, which last-mentioned sum had actually been received by William Farrar Acroyd himself, and by him handed over to the prisoner on the day following such receipt, viz., the 20th May, as a payment by the said Luccock, Lupton and Co., and the prisoner himself had, in the ledger where a debtor and creditor account was kept with Luccock, Lupton and Co., given Luccock, Lupton and Co. credit for the true amount of 751*l.* 5*s.* 10*d.*, so that by such false entry in the cash-book, the prisoner had made the balance in his hands, as abovementioned, appear less than it should have done by 20*l.* William Farrar Acroyd therefore charged the prisoner with such fraud, took possession of all that there was then remaining in the hands of the prisoner as cashier, and which was as follows, viz. :—

	£	s.	d.
Bank of England Notes	85	0	0
Gold	81	0	0
Half-Crowns	36	17	6
Shillings	10	15	0
Copper	0	0	4
Sixpences and Fourpenny-pieces	3	5	0
	<hr/>		
	£216	17	10
Taken by the prisoner to Carr Mill to obtain change	100	0	0
Paid on Mr. Acroyd's account (as above)	3	14	3½

£320 12 1½

Being 40*l.* less than the balance which the prisoner had shown on the 31st of May, though he had made no payment, nor was there any other circumstance that could occasion such diminution lawfully.

That upon examining the books kept by the prisoner, false entries were found, the correction of which would show a further deficiency to the amount of 170*l.*, and some of which were of this nature.

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The prisoner had entered in his cash-book, under date of 7th May, that he had received from David Midgley cash 365*l.* 4*s.*, and that he had allowed him a discount of 14*l.* 6*s.*, whereas the sum really received by the prisoner from David Midgley was 370*l.* 4*s.*, and the real discount allowed was 9*l.* 6*s.*, and the prisoner had signed, in due course, a receipt acknowledging the payment by David Midgley of cash to the true amount of 370*l.* 4*s.*, and had in the ledger (where a debtor and creditor account was kept with David Midgley), given him credit for the right aggregate amount of 379*l.* 10*s.* Eight false entries of this kind, including the cases of Luccock & Co., and Midgley, were found in the cash-book, effecting an aggregate fraud of 63*l.* The dates of them extend from 7th February to 19th May.

Another class of the prisoner's false entries consisted of misadmissions in his cash-book, *i. e.* adding his receipts at the bottom of the page to less, and his disbursements and allowances of discounts to more than the true amounts.

Those given in evidence extended from the 6th March to the 20th May.

It was not further shown at what particular time any sum was misapplied by the prisoner, nor were his deficiencies further traced to or identified with any of the particular sums to which the false entries related.

Counsel for the prisoner contended, that the facts above stated were no more than a general deficiency in the prisoner's accounts, and were not evidence to go to the jury as proving the prisoner guilty of the offence charged in the indictment.

The Chairman directed the jury—

1st. That as there was proof of a deficiency, and no proof that it arose from any other transactions than those which the false entries were made with an evident purpose to disguise and conceal there, was evidence from which a jury might infer that the deficiency did arise from those transactions.

2nd. That the nature of the false entries afforded evidence from which a jury might infer that the deficiency did not arise from negligence or accident, but was wilful and fraudulent.

3rd. That such false entries, commencing almost from the time of the prisoner's appointment as cashier and systematically continued, relating also to matters with respect to which it was his duty to make, without unreasonable delay, correct entries, were evidence from which a jury might infer that he received the moneys to which the said entries related, with no intention to apply the same faithfully, but with a preconceived intention to apply the same or some part thereof to his own use.

4th. That if the jury should make the inferences above mentioned, they might convict the prisoner upon this indictment.

The jury found a general verdict of Guilty, and the court sentenced the prisoner to four years' penal servitude, but states this case to the Court of Criminal Appeal, and requests the opinion of Her Majesty's Judges, whether the prisoner has been duly convicted.

The following cases were cited in argument: (*R. v. Grove*, 7 Car. & P. 635; *R. v. Hall*, Russ. & Ry. 463; *R. v. Chapman*, 1 Cox Crim. Cas. 47; *R. v. Moah*, ante, p. 60; 25 L. J. Rep. 66, M. C.)

This case was set down for argument on Saturday, January 24th, before the judges who then constituted the court (Pollock, C. B., Wightman and Cresswell, JJ., and Martin and Watson, BB.); but no counsel were instructed to argue.

CRESSWELL, J., now delivered the judgment of the court. This case was sent from the Sessions at Preston. The indictment was against the defendant as a servant for stealing, not for embezzling. The evidence set out is rather long. It appears that the learned Chairman put several questions to the jury, and he says the jury found a general verdict of guilty, and the court sentenced the prisoner to four years' penal servitude. He states a case to the Court of Criminal Appeal, and requests the opinion of Her Majesty's Judges whether the prisoner has been duly convicted. Of course, he means to inquire whether the evidence set out was such as would warrant a verdict of Guilty. Now, we think there is abundant evidence of embezzlement, but not evidence of stealing; and although, under the clause in the recent act of Parliament, (b) a prisoner indicted for stealing may be convicted of embezzlement, yet he cannot be convicted of stealing, if there is only evidence of embezzlement. Therefore we think the verdict was not warranted by the evidence, and the conviction must be reversed.

Conviction reversed.(c)

(b) 14 & 15 Vict. c. 100, s. 14.

(c) We have been informed that, in fact, the indictment in this case was in the ordinary form of an indictment for embezzlement; but that by mistake it was set out in the case as an indictment for larceny from the master. Assuming the charge to have been embezzlement and not larceny, the decision might seem to afford some sanction of authority upon points not previously decided. In the first place, the indictment alleged two charges only; but evidence seems to have been received upon the trial of at least eight different instances of false entries respecting sums received by the prisoner on account of his masters; and this is certainly contrary to the usual practice, which confines the proof to the sums specifically charged in the indictment. If evidence may be given of any number of different transactions, in which the prisoner has not duly entered and accounted for the sums received, for the purpose of showing that in the particular instances charged the errors were not the result of accident or carelessness, the legislative provision, permitting three distinct charges arising within a period of six months to be included in one indictment, seems very unnecessary. Secondly, with respect to money which had been paid by a customer to the master himself, and which was afterwards by the master handed over to the prisoner, a question would arise whether that was money received for and on account of the master within the meaning of the statute against embezzlement: (7 & 8 Geo. 4, c. 29, s. 47.) In *R. v. Masters* (1 Den. C. C. 332; 3 Cox Crim. Cas. 178), it was held, that where money was paid by a customer to a fellow-servant of the prisoner, and by that servant handed over to the prisoner, whose duty it was to pay it over to his master's cashier, that was a receipt of the money on account of his master, because the money was then in course of transit from the customer to the master; and upon that ground the court distinguished *R. v. Murray* (1 Moo. C. C. 276), where the prisoner received from a fellow-servant money which the master had given him to be applied to a particular purpose. It is observable, at all events, that no case has yet decided that the statute of embezzlement applies to the receipt of money which has once reached the master's own hands, and is by him handed over to a person in his employment. Nor can the present case be regarded as a decision upon these points. The observation in the judgment that there was abundant evidence of embezzlement is not at all necessary to the decision, which proceeded upon the assumption that the prisoner was convicted of larceny; nor does the expression necessarily import that if the indictment had charged embezzlement instead of larceny, the conviction for that offence might not have been open to some objection.

COURT OF CRIMINAL APPEAL.

July 22, 1856.

(Before LORD CAMPBELL, C.J., COLERIDGE and WILLES, J.J.,
and ALDERSON and BRAMWELL, BB.)

REG. v. CROSS and LEYLAND. (a)

Evidence—Compulsory examination of bankrupt—Admissibility of.

The examination of a bankrupt as to his trade dealing and effects, lawfully taken under sect. 117 of 12 & 13 Vict. c. 106, is admissible in evidence against him on a criminal charge arising out of the very matters as to which he was so examined:

So held, in a case where the bankrupt was tried with another for a conspiracy to defeat the remedies of the bankrupt's creditors by means of a judgment and execution, founded on a fictitious debt; and where the bankrupt had been cross-examined in the Bankruptcy Court as to the concoction of that fraud.

THIS case was reserved by Martin, B., before whom the prisoners were tried at the Liverpool Spring Assizes, 1856. They were indicted for a conspiracy to defeat the remedies of the rightful creditors of the prisoner, John Cross, by means of a judgment against him, and execution thereon in the Court of Common Pleas at Lancaster, under which his goods were seized, the alleged debt for which the judgment was given being fictitious. John Cross was duly made bankrupt, and examined in the ordinary way before the Commissioner(b) at Manchester. His examination was offered in evidence against him. It was objected to by his counsel, who stated that Willes, J., had admitted similar evidence at York, but reserved the question for the opinion of this court. The learned judge adopted the same course in the present case.

The case was set down for argument on the 3rd May, 1856, before Jervis, C.J., Coleridge, Wightman and Cresswell, JJ., and Martin, B.

Wheeler, for the prisoner, commenced his argument against the

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

(b) The examination, in fact, appears to have taken place before the Registrar: (see the observations of Coleridge, J., in *R. v. Scott*, ante, p. 174.)

admissibility of the document, and reference was made to *Sloggett's case, ante*, p. 139; but the court thought it necessary that a copy of the examination should be added to the case, in order that the court might see whether the examination was lawfully taken under section 117 of the Bankrupt Law Consolidation Act, 1849, and they ordered it to be amended accordingly.

The following copy of the examination was subsequently added to the case:—

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Evidence—
Examination of
a bankrupt.

The Bankrupt Law Consolidation Act.

In Her Majesty's Court of Bankruptcy at Manchester.

The fifth day of February, 1856.

I, John Cross, of Bolton Le Moors, in the county of Lancaster, innkeeper, the person declared a bankrupt under a petition for adjudication of bankruptcy, filed on the 16th day of January, 1856, do solemnly promise and declare that I will make true answer to all such questions as may be proposed to me respecting all the property of me the said John Cross, and all dealings and transactions relating thereto, and will make a full and true disclosure of all that has been done with the said property to the best of my knowledge, information and belief.

(Signed) JOHN CROSS.

The said John Cross having, on the day and year and at the place above mentioned, duly made, signed, and subscribed the solemn promise and declaration required by law to be made, signed and subscribed by bankrupts in lieu of an oath before me Nicholas Simons, Esq., Registrar, acting for William Thomas Jemmett, Esq., with his consent in writing, he being one of the Commissioners of Her Majesty's Court of Bankruptcy, acting in the prosecution of the said petition for adjudication of bankruptcy, I proceeded to examine him touching the discovery of his estate and effects, and on the following questions being put and propounded to him the said John Cross, he gave the several answers hereto respectively following each question, that is to say,

Q. Do you know William Ramsden, of Bolton, butcher? A. Yes, sir.
Q. Did he ever lend you any money? A. No. Q. Did you ever give him a promissory note for 70*l.* or any other amount? A. I don't know: if I did, I've forgot. Q. Did you, or did you not? A. Well, I cannot remember doing it.
Q. Did he not serve you with a writ in the month of December last for 70*l.*? A. Yes. I got a writ from Ramsden; this is it now produced. Q. Who served you with it? A. I don't know. I cannot speak to it. Q. Was it somebody from Preston? A. I don't know. There was somebody from Preston left a paper with my Missus. Q. When was it left? A. Some time beginning of this year. Q. Did Ramsden ever apply to you for money before you got the writ? A. No. Q. Did you ever enter an appearance to that writ? A. No. Q. Did the sheriff's officer take possession under that writ for Ramsden's debt? A. Yes; a sheriff's bailiff of the name of Massey came from Preston, and took possession. Q. Why did you not enter an appearance to the writ if you owed Ramsden no money? A. I did not know that I had any occasion. Q. Did Ramsden come to your house whilst Massey was in possession? A. No, I never saw him. Q. Was this placard issued to sell up for Ramsden, the placard having Thomas Massey at the foot, and marked B.? A. Yes. Q. At the time when that sale was to have taken place, had you received a summons from the Bankruptcy Court in respect of a debt of 158*l.* 14*s.* you owed to Messrs. Moxon and Sons? A. Yes. Q. When you say that you did not know you had any occasion to enter an appearance, had you never had a writ before? Yes, about eighteen months before, but I cannot speak exactly to the time. Q. Did you enter an appearance to that? A. Yes; I gave orders to you to do it. Q. Then why did you not, if you owed Ramsden no money, do the same? A. I thought there was no occasion. Q. Do you know John

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Murphy, of Bolton, agent and debt collector? *A.* Yes. *Q.* Have you consulted him about your affairs? *A.* No. *Q.* Whom did you consult about your affairs? *A.* Farnworth, a sheriff's officer, at Preston. *Q.* Was that before you got Ramsden's writ? *A.* Yes. *Q.* How long before you got Ramsden's writ? *A.* A few days. *Q.* Through whom did you become acquainted with Mr. Farnworth? *A.* Through James Leyland, telling me he was a likely man to make my affairs right. *Q.* Where did you have an interview with Farnworth? *A.* At his house at Preston. *Q.* Who took you to Farnworth? *A.* James Leyland took me there. I had never seen him before. *Q.* What did Farnworth advise you to do? *A.* Farnworth advised me to have a sale, put the money in my pocket, and then offer the creditors as much as I could pay them. *Q.* Was Ramsden's name mentioned at the time you were with Leyland at Farnworth's of Preston? *A.* I cannot say it was. *Q.* When did you consult Leyland about your affairs, which made him go with you to Preston? *A.* About six weeks or so before New Year's Day last. *Q.* Were you in difficulties at that time? *A.* Yes. *Q.* What did Leyland advise you to do? *A.* He advised me to have a sale, put the money in my pocket, and pay the creditors as far as it went. *Q.* What was the final arrangement made between you and Farnworth, after you had consulted him along with Leyland? *A.* It was agreed that he was to sell, and his man Massey afterwards came in. *Q.* Did you or Leyland pay Farnworth any money? *A.* Yes, Leyland did. *Q.* How much? *A.* Five pounds first, and five pounds afterwards, and the last six pounds, something altogether about seventeen pounds. *Q.* Whose money was that? *A.* It was mine. I found it to pay Farnworth. *Q.* What for doing? *A.* For these friendly writs. *Q.* What friendly writs? *A.* Ramsden's and John Lowe's, a tailor, of Bolton. *Q.* Did you owe John Lowe anything? *A.* No. *Q.* How much was John Lowe's writ for? *A.* Twenty pounds odd. *Q.* Who mentioned Ramsden's and Lowe's names to you? *A.* I cannot speak to that. *Q.* How long had you known Ramsden and Lowe? *A.* A good many years. *Q.* Were you in the habit of attending foot races? *A.* Yes, I've been to many a one. *Q.* Did Ramsden, Lowe and Leyland use to go with you? *A.* Ramsden and Lowe never went with me, but Leyland has been many a time. *Q.* What was the name of the attorney who issued the writs? *A.* It was Mr. Stanley, of Preston. *Q.* Did you ever see Mr. Stanley? *A.* Yes; once when I was at Farnworth's house he came in. *Q.* Had you sent for him? *A.* No. *Q.* What took place when Stanley came in? *A.* I don't know. Farnworth and he were talking together at the opposite side of the room. *Q.* How did Farnworth know that Ramsden's and Lowe's names were to be used in the friendly writs? *A.* I don't know. I am sure I did not tell him. *Q.* Was Leyland with you at this time? *A.* Yes; he went in the first train on Sunday morning, and I went by the twenty minutes past two in the afternoon of the same day. *Q.* Did the interview between you and Stanley and Leyland and Farnworth take place on the Sunday? *A.* Yes. *Q.* When you got to Preston whom did you first see? *A.* I saw Leyland, he met me at the train, and in an hour or so afterwards he took me to Farnworth's. *Q.* Who was to sell under this posting bill marked B, before referred to? *A.* Farnworth, the sheriff's officer. *Q.* Did Farnworth come over on Friday, the 18th of January last, to sell? *A.* Yes. *Q.* Did he sell? *A.* No; I told him the Bankrupt Court was in possession. *Q.* How long had Massey, Farnworth's man, been in possession up to the 18th January? *A.* I believe he came on the Monday before. *Q.* How long before this had you had any malt from Messrs. Moxons, of Pontefract, your creditors? *A.* About four months. *Q.* Did you brew that malt? *A.* Yes, all but two loads, which I sold to the landlord of the White Lion; he was without, waiting for some he had ordered. *Q.* What did you sell him that at? *A.* I sold it him at 53s. a load; at this time I had not got Messrs. Moxons' invoice, and I agreed with him he was to pay me invoice price in the event of its being more. *Q.* Did you sell anybody else any, either malt or hops, about this time? *A.* I cannot say, but to the best of my belief I did not. *Q.* Did you never sign a promissory note to William Ramsden which John Ball, fishmonger, witnessed? *A.* No, I don't believe I ever did. *Q.* Did not Massey and Farnworth both give up possession of your house on the 18th? *A.* Yes; on the same morning.

Q. To whom did Massey give the keys of the wine cellar, spirit cellar, and ale cellar? A. I believe he gave them to Farnworth.

"JOHN CROSS."

The case was again mentioned on 31st May, but it was not argued, in consequence of Baron Martin stating that he had reserved it with the understanding that, without any separate argument upon it, it should be governed by the decision in *R. v. Scott*, ante, p. 164.

Subsequently the judges present on that occasion (Lord Campbell, C.J., Coleridge and Willes, JJ., and Alderson and Bramwell, BB.) considered both cases; and on the 22nd July, 1856, judgment was delivered, affirming the conviction; all the judges, excepting Coleridge, J., holding the evidence admissible. The reasons for the judgment were given in the case of *R. v. Scott*.

Conviction affirmed.(c)

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(c) Although the decision in this case followed that in *R. v. Scott*, it has been thought desirable that both should be reported, as the point decided is new, and has been the subject of considerable discussion and some difference of opinion; and as also the special circumstances of each case may (with reference particularly to some of the remarks of Mr. Justice Coleridge) be considered important, as illustrating the extent to which the doctrine as laid down by the court is applicable.

COURT OF CRIMINAL APPEAL.

May 31, 1856.

(Before LORD CAMPBELL, C.J., COLERIDGE and CRESSWELL, JJ.,
and ALDERSON and BRAMWELL, BB.)

REG. v. THE INHABITANTS OF THE TOWNSHIP OF GATE
FULFORD. (a)

*Indictment for non-repair of a road—Liability under inclosure act—
Award—Authority of the Commissioners—Evidence of repairs—
Presumption of jurisdiction.*

Where, upon an indictment against the township of G. F. for non-repair of a public road, situate in the township of W. F., alleging a liability under an award of Inclosure Commissioners, it was contended for the defendants that the Inclosure Act only gave authority to the commissioners to set out roads in the township of G. F.; but evidence was given for the Crown that the township of G. F. had, on several occasions, repaired the road, as well as others in the township which were not public roads. The jury having found a verdict for the Crown subject to a case as to the defendant's liability:

Held, that assuming the contention of the defendants to be correct, there was evidence from which the jury might infer that at the time when the award was made the road lay entirely in G. F.

The road in question was described in the award as "a carriage road;" it branched out of a public highway, and led to a landing-place on the river Ouse, with a road branching from it to W. F. The landing-place was used by the inhabitants of G. F. and W. F., without paying toll, and by all other persons on payment of a toll to the lord of the manor. In the award some roads were described as public highways and roads; some as public carriage roads and some as private carriage roads; and one private road was described as a carriage road simply. The Inclosure Act provided that the public roads set out by the commissioners should be repaired by the township of G. F.

Held, that the road indicted sufficiently appeared to be a public road set out under the powers of the act, and therefore repairable by the township of G. F.

THIS was an indictment against the inhabitants of the township of Gate Fulford, in the county of York, for the non-repair of a highway. It came on to be tried before the Honourable Mr.

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

Justice Cresswell, at the Spring Assizes for the said county, held at York, on the 7th day of March, 1855, when a verdict was entered for the Crown on the three first counts, the two last being abandoned, subject to the following case reserved for the opinion of the Court of Criminal Appeal.

The indictment contained five counts; the fourth and fifth counts were abandoned at the trial, and no question arises upon them.

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County of York, } The jurors for our lady the Queen upon their oath present
to wit. } that before the day of the taking of this inquisition by a certain act of Parliament made in the thirtieth year of the reign of His late Majesty King George the Second "For dividing and enclosing certain fields meadows and commons in the manor of Fulford in the county of York" the said manor of Fulford then and still being in the East Riding of the county of York aforesaid: It was amongst other things enacted that Robert Bewlay Richard Mason and Samuel Milbourn therein described should be and they were thereby nominated and appointed commissioners for the dividing and allotting the common fields ings and commons in the said act mentioned and for the executing the several other powers thereafter mentioned and for that purpose they the said commissioners or the major part of them should within twelve calendar months thence next ensuing cause a true and perfect survey and admeasurement to be made by such person or persons as they or the major part of them should think fit of the said common fields ings and commons or waste grounds so intended to be divided as aforesaid and after such survey and admeasurement so made should set out divide apportion and allot the same respectively in the manner thereafter mentioned. And it was in and by the said act amongst other things provided that the said commissioners or the major part of them should have power to set out one statute acre of land or so much more as they should think necessary in some part or parts of the said common fields or either of them for the common use of the proprietors of the said fields to supply them from time to time with gravel or sand for repairing the highways in the township of Gate Fulford in the said act mentioned. And it was thereby further enacted that the said commissioners or the major part of them should have power to set out all such public and private ways and roads and ditches fences drains bridges gates and stiles as they should think necessary or convenient in over and upon the lands so intended by the said act to be divided and allotted (so as all such public highways so to be set out should be of the breadth of forty feet at least between and exclusive of the ditches) and to order and appoint by whom and in what manner all the said roads and ways ditches fences drains bridges gates and stiles should respectively be made and thereafter from time to time repaired maintained and kept in repair. And in the said act it was provided that all such public and common highways when so set out and made as aforesaid should from time to time be repaired and kept in repair by the inhabitants of the township of Gate Fulford in the county of York. And that after such ways and roads should be so set out and made it should not be lawful for any person or persons in any manner whatsoever to use any other public or private way or road in or over the said lands so to be divided and allotted or any of them. And it was thereby further enacted that the said commissioners or the major part of them should within two years after such survey and admeasurement should be made as aforesaid make or cause to be made an award or instrument in writing in which they should express the several things in the said act more particularly mentioned and which said award should contain amongst other things proper orders and directions concerning such public and private roads and ways and concerning the fences ditches drains bridges gates and stiles in over and upon the said lands so intended to be divided and inclosed as aforesaid together with all such other orders and directions as they the said commissioners or the major part of them should think necessary or proper for the perfecting and completing the said intended division and inclosure. And that such award or instrument should be fairly ingrossed upon parchment and sealed and delivered by the said commis-

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sioners or the major part of them and then inrolled at length in the public register office for registering deeds in the east riding of the said county of York and the registrar of the said east riding or his deputy was thereby required to inrol the said award amongst the inrolments of bargains and sales of lands in the same riding. And the jurors aforesaid upon their oath aforesaid further present that after the making and passing of the said act the said commissioners took upon them the execution of the powers and authorities so vested in them by the said act as aforesaid and thereupon within the said period of twelve calendar months made or caused to be made a true and perfect survey and admeasurement of the said common fields ings and commons or waste grounds so intended to be divided pursuant to the said act and after such survey and admeasurement having been so made or caused to be made did set out divide apportion and allot the same common fields ings and commons or waste grounds respectively in the manner in the said act mentioned and directed and amongst other things did set out divide apportion and allot one acre of land in a certain part of the said common fields so intended to be divided and allotted as aforesaid for the common use of the proprietors of the said fields to supply them from time to time with gravel or sand for the purpose in the said act mentioned and did also set out such public and private ways and roads and bridges as they thought necessary or convenient in over and upon the lands so by the said act intended to be divided and allotted as aforesaid and amongst others the public way or road and bridge respectively hereinafter particularly mentioned and alleged to be out of repair and executed to the best of their judgment the several other powers vested in them by the said act. And the jurors aforesaid upon their oath aforesaid further present that after the making and passing of the said act and after the said commissioners had taken upon them the execution of the powers and authorities vested in them in and by the said act as aforesaid and within two years to wit immediately after making such survey and admeasurement as aforesaid and after completing such division and allotment and after executing to the best of their judgment the several other powers vested in them by the said act to wit on the tenth day of October in the year of our Lord one thousand seven hundred and fifty-nine the major part of the said commissioners to wit the said Robert Bewlay and the said Richard Mason did make or cause to be made an award or instrument in writing in which they did express the several matters and things in the said act in that behalf mentioned and which said award or instrument in writing so made as aforesaid did contain proper orders and directions concerning such public and private roads and ways and concerning the fences ditches drains bridges gates and stiles in over and upon the said lands so by the said act intended to be divided and inclosed as aforesaid together with all such other orders and directions as they the major part of the said commissionersthought necessary or proper for the perfecting and completing the said division and inclosure according to the true intent and meaning of the said act and the said award or instrument was fairly engrossed upon parchment and sealed and delivered by the major part of the said commissioners to wit by the said Robert Bewlay and Richard Mason and was then to wit on the eighteenth day of July one thousand seven hundred and sixty-three inrolled at full length by the then registrar or his deputy in the public register office for registering deeds in the east riding of the said county of York as was by the said act directed in that behalf. And the jurors aforesaid upon their oath aforesaid further present that the said commissioners by their said award amongst other allotments by them therein made of the said common fields ings and commons or waste grounds by the said act intended to be divided and allotted as aforesaid did thereby allot and award one acre of land by certain abutments and boundaries in the said award mentioned and as the same was then staked out and they the said commissioners did thereby award that the said one acre so by them set out as aforesaid should be to and for the common use of the proprietors of the said common fields to supply them from time to time with gravel or sand for repairing the highways in the said township of Gate Fulford as by the said award reference being thereunto had will more fully and at large appear which said one acre was so set out allotted and awarded in a certain part of the said common fields by the said act intended to be divided and allotted as aforesaid and by reason of

the premises and by force of the said act and by virtue of the said award so in pursuance thereof by the said commissioners made as aforesaid thereupon was and from thence continually hath been and still is held and enjoyed to and for the common use of the proprietors of the said fields to supply them from time to time with gravel or sand for repairing the highways in the said township of Gate Fulford. And the jurors aforesaid upon their oath aforesaid further present that the said commissioners by their said award amongst several public and private ways and roads made and by them therein set out and appointed and which they thereby adjudged to be necessary and convenient to be made in over and upon the said lands intended to be divided and allotted as aforesaid did order and award that there should be one carriage road branching out of the last thereinbefore mentioned road (and which said last hereinbefore mentioned road is in the said award described to be and is a public carriage road leading from the south end of Fulford aforesaid to Selby in the east riding aforesaid and is part of a common Queen's highway leading from the city of York over the said townships of Water Fulford and Gate Fulford and certain other townships to Selby in the said county) and which said first abovementioned carriage road so awarded as aforesaid is described in the said award as leading to Water Fulford aforesaid and a certain landing place in the said award mentioned that is to say the landing place adjoining a certain public navigable river called the Ouse and the said commissioners did thereby further order and award that there should be one carriage bridge over the water sewer across the said road so set out as lastly aforesaid and in the said award more particularly described and the said commissioners did thereby further order and award that the said road and bridge should be made and from time to time kept in repair by the inhabitants of Gate Fulford aforesaid in the said award called the township of Fulford aforesaid as by the said award reference being thereunto had will more fully and at large appear which said carriage road so set out ordered and awarded by the said commissioners as hereinbefore mentioned was then and there to wit in over and upon the said lands so intended to be divided and allotted as aforesaid of the breadth of forty feet at the least to wit of the breadth of forty feet between and exclusive of the ditches and was so set out as aforesaid in over and upon the said lands by the said act intended to be divided and allotted as aforesaid and by reason of the premises then and there became and was and from thenceforth continually hath been and still is a common public highway used for all the liege subjects of our lady the now Queen and her predecessors to go return pass and repass on foot and on horseback and with cattle carts and carriages at their will and pleasure and to be amended and repaired at the general expense of the inhabitants of the said township of Gate Fulford. And the jurors aforesaid upon their oath aforesaid further say that the whole of the said carriage road so set out ordered and awarded as aforesaid for the length of divers to wit three hundred yards and in breadth divers to wit forty feet after the same had been so set out ordered and awarded as aforesaid and after the making and inrolment of the said award of the said commissioners in manner and form aforesaid and after the said carriage road had been completed and made to wit on the first day of January in the year of our Lord one thousand eight hundred and fifty four and from thence continually afterwards until the day of the taking of this inquisition in the township of Water Fulford aforesaid in the county aforesaid was and yet is very ruinous miry deep broken and in great decay for want of due reparation and amendment of the same so that the Queen's subjects through the same way with their horses coaches carts and waggons could not during the time aforesaid nor yet can go return pass ride and labour without great danger of their lives and the loss of their goods to the great damage and common nuisance of all the Queen's liege subjects through the same way going returning passing riding and labouring and against the form of the act of Parliament aforesaid and against the peace of our said lady the Queen her crown and dignity and that the inhabitants of the said township of Gate Fulford aforesaid the said carriage road so ordered and awarded as aforesaid so as aforesaid being in decay by reason of the premises and by force of the said Act and by virtue of the said award so in pursuance thereof by the said commissioners made as aforesaid ought during the time last aforesaid to have

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repaired and amended and still of right ought to repair and amend the said highway so being in decay as aforesaid when and so often as it hath been and shall be necessary.

The second and third counts were precisely the same as the first except that instead of describing the road as being in the township of Water Fulford in the county of York the second count described it as being in the parish of Gate Fulford in the county aforesaid and the third count described it as being in the township of Gate Fulford in the county aforesaid.

To this indictment the defendants pleaded not guilty. At the trial the counsel for the prosecution put in evidence, and proved the Act of Parliament and award referred to in the indictment. The award which bears date the 10th day of October, 1759, was duly made, engrossed, and inrolled according to the provisions of the said act, and all things necessary to give validity to it were done and performed. Copies of the material parts of the said act and award accompany this case, and are to be treated as part of it, but if necessary full copies of the said act and award are to be referred to.

The manor of Fulford, mentioned in the said act and award, consists of the township of Gate Fulford, and part of the township of Water Fulford, and there is a parish called Fulford Ambo, which is co-extensive with the said manor. The road indicted, which is 441 yards long and 40 feet wide, branches out of a public highway between York and Selby, and leads to a landing-place on the river Ouse, with a road branching from it to Water Fulford, as hereinafter described. It is set out in the award as follows:—

“And we do order and award that there shall be one other carriage road branching out of this last-mentioned road, and leading to Water Fulford, and the landing-place hereinafter to be mentioned, abutting on the allotment of the above-named Frances Barlow, and the heirs of the said Edward Stabler hereinbefore mentioned, and one carriage bridge over the water-sewer, across the road running into the allotment of the said Frances Barlow, which said road and bridge shall be made, and from time to time kept in repair by the inhabitants of the township of Fulford aforesaid.” (b)

The landing-place is used by the inhabitants of the township of Gate Fulford and Water Fulford without paying any toll. From all other persons using the said landing-place, the Lord of the

(b) In and by the award various roads were set out.

Several were described as “public highways, or roads,” with “carriage bridges” over drains crossing the same; and were directed to be repaired by the inhabitants of the township of Gate Fulford.

Some as “private carriage roads,” to be repaired by the proprietors of the allotments on either side, with carriage bridges where necessary.

Others as “public carriage roads,” to be “repaired by the inhabitants of the town of Fulford.”

And also “one other carriage road leading from Fulford aforesaid, to the several allotments on the west moor,” repairable by the proprietors of the allotments.

A plan was annexed to the case, and some further description of the road and adjoining allotments was given with reference to the plan; but it is believed that the general situation and user of the road will be sufficiently understood from the remaining statements in the case.

Manor of Fulford has been in the habit of exacting a toll for the use thereof.

The Lord of the Manor of Fulford is the owner of the land on both sides of the road as delineated on the plan, with the exception of the said parts numbered respectively 2 and 4.

Evidence was given at the trial, on behalf of the prosecution, that the road in question was used by all persons who chose to use it for the purpose of going to and from the said landing-place, for the use of the same in the manner hereinbefore described; and that on various occasions till within the last fifteen or twenty years it had been repaired from time to time by the surveyors of the highways of the township of Gate Fulford and by occupiers of land in that township; and that for the purpose of such repairs materials had been used which had been gotten from the acre of land set out under the award for getting sand or gravel for repairing the highways in the township of Gate Fulford. It was also proved, on cross-examination of witnesses for the prosecution, that similar repairs were done from time to time during the same period, by the said surveyors and occupiers of land in the said township of Gate Fulford, to all the bye roads as well as the public roads in that township, and also that repairs to the road indicted were done during the surveyorship of a Mr. Wormald, who was proved to have used the said road very much for the purpose of carting timber to and from the said landing-place.

The road in question was out of repair as charged in the indictment.

The counsel for the prosecution contended that under the circumstances above set forth, the defendants were liable for the non-repair of the said road as charged in the indictment.

The defendants' counsel on the other hand contended:—

1st. That the defendants were not liable.

2nd. That the Commissioners had no power under the act to deal with any part of the manor which was not in the township of Gate Fulford.

3rd. That they were only empowered to throw on the defendants the burden of repairing the high roads over the enclosed landing in the township of Gate Fulford.

4th. That if the road was one which they had authority to deal with at all, as they had not by their award declared it to be a public highway, they had no power to throw the burden of repairing it on the defendants.

5th. That it could only be made a public highway by the award.

If the Court of Criminal Appeal shall be of opinion that the defendants are not liable as charged in the indictment, then, a verdict thereon is to be entered for them; otherwise the verdict entered for the Crown is to stand.

The case was argued May 31, 1856, before the Judges above-named.

Kemplay (*H. Hill* with him) appeared for the prosecution; but

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The court directed the counsel for the defendants to begin in accordance with the ordinary practice of this court.

T. F. Ellis (*Price* with him) for the defendants.—The conviction cannot be sustained. At common law the defendants are not liable to this indictment; and the prosecutors are bound to show clearly that the Inclosure Act and the award taken together, have cast upon the township of Gate Fulford the obligation to repair the road in question. This they have failed to do. First, They do not shew this to be a public road; and if it be not a public road, the act of Parliament does not impose upon the defendants the duty of repairing it; nor does the award. The award in terms requires “the township of Fulford” to repair, meaning, probably, the town, as is expressed in the award with respect to another road. But if the award had expressly directed the defendants to repair, the direction would have been altogether invalid as being *ultra vires*: (*R. v. Cottingham*, 6 T. R. 20; *R. v. Richards*, 8 T. R. 634; *R. v. Enfield*, 3 Burn’s Justice, 82 (ed. 1837) note (a); *R. v. Edmonton*, 1 Moo. & R. 24.) Now the Commissioners have not set out the road in question as a public road. They describe it as a carriage-road; and there is nothing in that expression to shew that they meant it to be a public road. On the contrary, they describe some carriage-roads as private, and the only other instance in which they speak of “a carriage-road” simply, they evidently mean a private road. In addition to which the user of this road is not by the general public, but only by the inhabitants of the two townships. All other persons who use the landing-place, to which the road is an approach, have to pay a toll to the Lord of the Manor for permission to go there: (*Poole v. Huskisson*, 11 Mee. & W. 827.) Secondly, If the Commissioners had declared this to be a public road, they would have exceeded their powers; for the act only authorizes them to set out such roads in Gate Fulford, and this road is as to a considerable part of it in Water Fulford.(c) [CRESSWELL, J.—The whole manor includes part of Water Fulford; and the general jurisdiction of the Commissioners to divide and allot extends over the whole manor.] But the jurisdiction to do the particular act must be clearly established, and not left to presumption. [LORD CAMPBELL, C. J.—The jurisdiction depends upon the existence of a certain fact; and if there was evidence which would warrant the jury in inferring the existence of that fact, it is enough. We are not to consider here the weight of the evidence. CRESSWELL, J.—The evidence of repairs done by the defendants was something to be submitted to the jury, who may have inferred that, though at the present time a part of the road is considered to lie in Water Fulford, yet, when the award was made, it lay wholly in Gate Fulford.] In point of fact, no such question was ever submitted to the jury; the contrary being assumed as the fact; but if it had, they would not have been

(c) *Kemplay* admitted that the defendants would not be liable, if the commissioners had exceeded their jurisdiction in setting out any part of the road indicted.

warranted in drawing the inference suggested from such evidence of repairs as was given in this case: (*R. v. Enfield*, per Lord Tenterden, C. J.)

Kemplay was not heard.

LORD CAMPBELL, C. J.—A verdict has been found for the Crown upon the facts proved; and that verdict is not to be disturbed, unless we can see that the defendants are not liable as charged in the indictment. There was evidence from which a jury might infer that the necessary facts existed to give the Commissioners jurisdiction to set out this road as a public road; and if they had jurisdiction, I think it sufficiently appears that they have so set it out under the powers of the act, and that the defendants are, consequently, bound to repair it.

ALDERSON, B.—This is certainly a road set out over lands intended to be inclosed under the act of Parliament; and I think also it is a public road.

COLERIDGE and CRESSWELL, JJ., and BRAMWELL, B. concurred.

Conviction affirmed.

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COURT OF QUEEN'S BENCH.

June 11 and 12, 1856.

(Before LEFROY, C. J., CRAMPTON, PERRIN, and MOORE, JJ.)

REG. v. WOODSIDE. (a)

*Habeas corpus — Conviction bad for uncertainty of sentence—
Exhibiting articles of the peace.*

On a return to a writ of habeas corpus, the gaoler returned two committals. The first was on a conviction under the Summary Jurisdiction Act (14 & 15 Vict. c. 92), dated the 21st May, and sentenced to two months' imprisonment, and to give bail to keep the peace for seven years; the second was on a conviction dated the 7th June, with a sentence of imprisonment for two months, and without the order to give bail. The period from which the time of imprisonment was to be computed was not stated in either:

Held, that the first conviction was bad, as being an excess of jurisdiction, as the magistrates in proceeding under the Summary Jurisdiction Act, were not justified in passing any sentence not warranted by the act.

That the second conviction was bad for uncertainty, as, if the time should be computed from the date of the warrant, the sentence would be in excess of the magistrates' jurisdiction, and there were no means of ascertaining otherwise what the period was.

A person proposing to exhibit articles of the peace, should be present in court when they are sworn and exhibited.

When articles of the peace have been exhibited against a person, the court will direct that he should be confined in the gaol of the neighbourhood where he resides, if he so desire, in order to enable him to obtain bail.

A WRIT of habeas corpus having issued to the governor of the county Antrim gaol to return the body of John Woodside into court, together with the causes of his detention, the following committals were returned in obedience to the writ:—

(a) Reported by P. J. M'KENNA, Esq., Barrister-at-Law.

County of the Town of } To the constables of Carrickfergus, or
 Carrickfergus, to wit. } any of them, and to the keeper of the
 gaol of the county of Antrim, at Belfast, in the said county of
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Whereas John Woodside, late of the middle division of the county of the town of Carrickfergus, was, on the 21st day of May, 1856, duly convicted before the undersigned, one of Her Majesty's justices of the peace in and for the said county of the town of Carrickfergus, at petty sessions, and Steward Dunne, Valentine William Magill, and James Barnett, esquires, three other of Her Majesty's justices of the peace in and for the said county of the town of Carrickfergus, at said petty sessions assembled, on the oath of Mary Woodside and others, of said middle division, for that he the said John Woodside, in the said middle division of the county of the town of Carrickfergus, on the seventh day of May last past, did then and there violently assault his wife Mary Woodside, and did threaten to take away her life: it was thereby adjudged that the said John Woodside, for his said offence, should be imprisoned in the county of Antrim gaol, at Belfast, in the said county of Antrim, for the space of two calendar months.

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These are, therefore, to command you, the said constables of Carrickfergus, or any of you, to take the said John Woodside, and him safely convey to the county of Antrim gaol, at Belfast aforesaid, and there deliver him to the keeper thereof, together with this precept; and I do hereby command you, the said keeper of the said gaol, to receive the said John Woodside into your custody in the said gaol, and there to imprison him for two months.

Given, &c., 7th June, 1856.

JOHN LEGG, J. P.

True copy of second committal.

J. W. FORBES, Governor.

County of the Town of } To the constables of Carrickfergus, or
 Carrickfergus, to wit. } any of them, and to the keeper of the
 gaol of the county of Antrim, at Belfast, in the said county of
 Antrim.

Whereas John Woodside, late of the middle division of the county of the town of Carrickfergus, was this day duly convicted before the undersigned, one of Her Majesty's justices of the peace in and for the said county of the town of Carrickfergus, on the oath of Mary Woodside and others; for that the said John Woodside, in the middle division of the county of the town of Carrickfergus, on the seventh day of May instant, did then and there violently assault his wife Mary Woodside, and did threaten to take away her life; and it was thereby adjudged that the said John Woodside, for his said offence, should be imprisoned in the county of Antrim gaol, at Belfast, in the said county of Antrim, for the space of two calendar months, and to give bail, himself in one hundred pounds and two sureties of fifty pounds each, to keep the peace for seven years.

These are, therefore, to command you the said constables of

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Carrickfergus, or any of you, to take the said John Woodside, and him safely convey to the county of Antrim gaol, at Belfast aforesaid, and there deliver him to the keeper thereof, together with this precept, and I do hereby command you the said keeper of the said gaol to receive the said John Woodside into your custody in the said gaol, and there to imprison him for two calendar months, and, at the end of the said two months, *to be further imprisoned until he gives bail, himself in one hundred pounds and two sureties in fifty pounds each, to be of the peace for seven years*, and for your so doing this shall be your sufficient warrant.

Given, &c., 21st May, 1856.

JOHN LEGG, J. P.

This was accompanied by a certificate that, since the said John Woodside was placed in custody under the above warrant, another committal, a copy of which is firstly above stated, was handed to the keeper of the gaol.

McMechan, for the prisoner, now moved that the prisoner be discharged from custody, on the ground of both warrants being bad, when he was stopped by

Ferguson, who appeared for Mrs. Woodside, suggesting that there was no necessity to argue upon the validity of the warrants, as Mrs. Woodside's only object was to protect herself from future violence, and he now proposed to exhibit articles of the peace against the prisoner, already sworn, and moved that they should be filed.

McMechan.—Articles of the peace should be exhibited in the neighbourhood in which the parties reside: (*Rex v. Richard White*, 2 Burr. 780.) In that case the court rejected articles of the peace, which one Thomas, of Devizes, offered to swear against the defendant, who resided at the same place. The reason was that the complainant had chosen to come up to apply to the court at such a distance from the defendant's residence, which course would put the defendant to the unnecessary inconvenience of being brought up to London instead of finding security in the country. Again, the exhibitant should be in court and be sworn to the articles here, and in her absence they should not be exhibited. It is stated, in Grady and Scotland's Practice of the Crown Side of the Queen's Bench, as the practice when articles are to be exhibited: "They are afterwards signed by the exhibitant and sworn to in open court, or affirmed or declared to, and, if necessary, the court will for this purpose, on an affidavit of the circumstances, grant an habeas corpus to bring up the party:" (*R. v. Ferrers (Earl)*, 1 Burr. 631.)

Ferguson.—It may be usual to do so, but there is no authority to show it is absolutely necessary.

After consulting for a few moments with the other members of the court, the Chief Justice said, that they had considered the question, and were of opinion that the party must attend personally to exhibit the articles of the peace.

Ferguson.—The exhibitant is down in Antrim. We shall tele-

graph for her to come up, and have her in court to-morrow morning.

McMechan.—The prisoner is entitled to his discharge, the committals are abandoned, and there is no ground for detaining him.

Ferguson.—The court has not disposed of the prisoner's application for his discharge yet; if he is set at large, we apprehend, from his previous conduct, that he may in the interval again offer violence to his wife.

LEFROY, C. J.—Let the two motions stand for to-morrow morning, and, in the interval, let the prisoner be handed over to the custody of the sheriff of the city of Dublin to be kept in Richmond Bridewell. He is to be brought up at eleven o'clock to-morrow morning.

McMechan.—There is no precedent for such a course. The prisoner is now entitled to his discharge.

CRAMPTON, J.—If there is no precedent, we will make one.

McMechan.—The first committal is bad, as, in addition to the imprisonment for two months, it recites a judgment that he should give bail to keep the peace for seven years, and in default to be imprisoned until he should do so. That is an excess of jurisdiction, as, under the Summary Jurisdiction Act, 14 & 15 Vict. c. 92, s. 2, two months' imprisonment is the most extended sentence the magistrates are authorized to pass for such an offence as this. Again, nothing appears on the face of the committal which would show that there was reason to apprehend future violence, and therefore to warrant binding the prisoner to keep the peace. The second committal is bad for uncertainty, as it does not state from what day the two months are to be reckoned; or, if the two months are to be computed from the day on which the warrant was executed, it is bad for excess of jurisdiction, because there would be then more than two months' imprisonment to be suffered by the prisoner.

LEFROY, C. J.—What have you to say to exhibiting articles of the peace?

McMechan.—I say, if the prisoner is legally in custody, you have no right to bind him over to keep the peace, there is no necessity for it; if illegally in custody, he is now entitled to his discharge.

Ferguson.—I abandon the first committal, but have a right to fall back on the second. In *Regina v. Richards and others* (5 Q. B. 926), the return to a habeas corpus stated that the prisoner was committed for three months by warrant of a justice set forth in the return. The recited conviction on the face of it was bad. The return then stated that, a week after such commitment, the prisoner being still in custody, the same justice delivered to the gaoler another warrant of commitment, reciting and grounded upon a conviction of the same date as the first, by the same justice, setting forth the same offence, and imposing the same punishment. In this conviction no material defect appeared, and it was held that the prisoner was not entitled to his discharge, the return showing

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a good warrant under which he was in custody. The second conviction is good; and, as no date is given from which the imprisonment is to commence, it is to be intended that it means from the day on which Woodside was committed to prison, namely, the 21st of May, 1856.

LEFROY, C. J.—Is there any authority for saying, when a man is brought up in custody under a writ of habeas corpus, and a person comes into court and seeks to exhibit articles of the peace against him while in court, that, because he is not legally in custody, we are therefore bound to discharge him? Suppose there were a valid warrant out against him for a totally different offence, do you contend that we should discharge him nevertheless? Why, on circuit, when a prisoner has been acquitted, and I direct the gaoler to discharge him, how frequently am I told there is another charge against the prisoner.

MOORE, J.—Suppose it were made apparent to the court that the prisoner, as soon as he should be set at liberty, would commit a murder, do you mean to say that we should discharge him and could not call on him to give security for keeping the peace?

McMechan.—I submit that you are not justified in detaining the prisoner on the suggestion that a charge is about being made against him. In *Atkinson v. Carty* (1 Jebb & Symes, 369), it was held that a magistrate is not justified in detaining a known person amenable to the law on an intimation that a charge of a misdemeanor is to be made against him, without an information being regularly laid before such magistrate.

CRAMPTON, J.—In that case the plaintiff was kept in custody until an information should be sworn and materials for that information procured. The person who charged the plaintiff went away to get the necessary evidence, and, in the meantime, the plaintiff was detained. The decision in that case was, that a magistrate cannot detain a party in custody in expectation of a charge being made against him.

On the following day Mrs. Woodside appeared in court and was sworn to the articles of the peace, which were then filed and read by the Clerk of the Crown. It was stated therein that the exhibitant was administratrix to her first husband, and that a sum of upwards of 300*l.* was lodged in the Bank in her name, which was the portion of her son by her first marriage, that the prisoner had frequently called upon her to sign a transfer of the boy's property to him, and that, on her refusal, he used threatening gestures and language towards her, that on one occasion he had dragged her out of bed by the throat, and swore he would shoot her, presenting a gun at her, that she was afraid to remain in the same bedroom with him, and that she having on the following night gone to her sister, he had broken in to the room where she was and assaulted her again, calling on her to give up the money.

McMechan.—The husband is the proper person to have any papers or documents belonging to his wife, either in his own right or as trustee. She was wrong in opposing his wishes, and the law

is not to interfere between husband and wife, because the man may use threats.

LEFROY, C. J.—We have no hesitation here, as the prisoner is now in court, in at once ordering that he shall be bound over to keep the peace, himself in 100*l.* and two sureties in 50*l.* each. On the habeas corpus and return he is entitled to his discharge.

Ferguson.—The 39th section of the Petty Sessions Act, 14 & 15 Vict. c. 93, provides, that no objection shall be taken to any information, complaint, summons, or warrant, or other form of procedure under the act for any alleged defect therein in substance or form, &c.; and, if such defect should appear to have misled, that the justices should adjourn the hearing of the case. This conviction comes within those general words, and the informality of the second warrant is cured.

LEFROY, C. J.—We are of opinion that the objections to the warrants must prevail, and that the prisoner should not be detained in custody upon them. The first, on the face of it, is bad, for exceeding the jurisdiction of the magistrates. The second warrant is open to the same objection; for it is not possible for us to give any interpretation to the second which would not make it from the 7th of June. There is, therefore, a substantial defect in both of them, and the section relied on to support these warrants does not apply to this sort of case, but to a case where the defect can be set right, as on appeal, or on the hearing of a summons. The matter does not here come before us as a court of appellate jurisdiction, the only question for us is, have we, on the two committals returned as the cause of the prisoner's detention, sufficient ground, in point of law, to justify that detention? We do not think we have. We shall, however, direct him to be detained under the articles exhibited against him until he gives the security we have mentioned; and if ever there were a case in which the court wished to make a precedent, this is the case; for a more outrageous proceeding, or one more calculated to excite terror of life, could not be brought before the court.

PERRIN, J.—I think the return to the habeas corpus is bad, there is no ground for saying the act interferes with returns to writs of habeas corpus. The sentence is ambiguous, it is either for two months prospectively, or for two months less the interval past.

In compliance with the prisoner's wish, the court directed that he should be remanded to Belfast gaol, to be in a position to be bailed without unnecessary expense.

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DUBLIN COMMISSION COURT, GREEN STREET.

OCTOBER SESSIONS, 1856.

(Before PIGOT, C. B., and RICHARDS, B.)

REG. v. ELIZA TOOLIE. (a)

Confession—Statement by prisoner to constable—Policy of 11 & 12 Vict. c. 42, English—14 & 15 Vict. c. 93, Irish—Rule as to the admissibility of statements by prisoner.

A prisoner, in custody, was interrogated with the following caution by an inspector of police: "You are accused of a very serious offence, have you any explanation to give? You are not bound to say anything, but anything you do say will be given in evidence against you."

Held, the prisoner's answer should not be received in evidence:

Semble, that a judge should be slow to admit statements made by prisoners to persons holding them in custody, and that the admission of such evidence is contrary to the policy of the 11 & 12 Vict. c. 42.

THE prisoner was indicted for attempting to set fire to the workhouse of the North Dublin Union.

The constable who arrested the prisoner was called and examined by J. A. Curran.

I arrested the prisoner on 26th August last.

Curran.—Did she say anything about the fire?

RICHARDS, B.—Get the words she used.

Examination continued.—I took her to the station-house. She spoke in my presence while we were at the workhouse. What she said was in answer to a question put by the inspector of police. She was previously cautioned. I cannot recollect the words; they were something to this effect, that any admissions made by her would be used against her. The inspector's question was, "was it she who had set fire to the things?"

RICHARDS, B.—I think you had better get the inspector. I express no opinion yet as to the admissibility of the prisoner's statement.

Inspector called and examined. I said to her, "You are accused of a very serious offence, have you any explanation to

(a) Reported by P. J. M'KENNA, Esq., Barrister-at-Law.

give? You are not bound to say anything, but anything you say will be given in evidence against you."

Curran.—I submit now that the statement of the prisoner is properly admissible. In Arch. Crim. Law, 194, the result of the case is thus given: "But a statement made to a constable after he had told the defendant the nature of the charge against him, and that he need not say anything to criminate himself, but what he did say would be taken down and used in evidence against him, was held to be admissible;" and the authorities referred to for this proposition are *Reg. v. Baldy*, 2 Den. C. C. 430; *Reg. v. Farley*, Cox Crim. Cas. 76; and *Reg. v. Harris*, ib. 106. I am aware that there is a difference of opinion and practice amongst the judges on this point, and perhaps it would be desirable to reserve the question for the Court of Criminal Appeal as to whether statements made to constables after arresting a prisoner should be admitted.

PIGOT, C.B.—I do not think the abstract question is now before us, or that we are called on to decide it. The view I take of the present point for our decision is this: it is essential that the judge should be satisfied that the statement of the prisoner has not been the result of some influence acting upon his mind, either of hope or fear. I am not satisfied upon that point, and therefore I reject the evidence. The new Act, 14 & 15 Vict. c. 93, s. 14, points out the authority before whom the prisoner is to be taken, namely, a justice or justices of the peace; and provides that after a solemn inquiry, and after the prisoner has heard the evidence for the prosecution, has learned the nature of the offence with which he is charged, and received the caution prescribed, that then his statement shall be taken down in writing, and may be given in evidence against him. When the Legislature thinks a prisoner should be protected from improper or unfair influence by such precautions, I never can be satisfied that the proper caution has been given, depending on the fleeting memory of an individual. It is difficult to place reliance upon a person who, however truthful and well-disposed he may be, is naturally anxious to get evidence; and I can only say that, for my part, I am not satisfied that the proper caution has been given.

RICHARDS, B.—I do not recollect having before been called on to decide the exact point raised in this case. When there is, as I am informed, a difference of opinion among the judges on this question, I should doubt the soundness of my opinion. I am rather disposed to think that this evidence ought not to be received. I am considerably influenced, I must say, by the opinion of my Lord Chief Baron. I am sure that what the witness has stated is true, that there was neither threat nor inducement for the purpose of forcing a confession. From the mere circumstance of being in custody, the prisoner was not on equal terms with her interrogator. The rule is, that if there has been any motive of fear or hope acting on the prisoner's mind, the statement consequent on this state of mind should not be admitted. As stated by

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my Lord Chief Baron, if it is desirable that the prisoner should be examined by a magistrate, that she should be duly cautioned, that her statement should be taken down in writing, we should be slow to admit statements otherwise obtained. Without laying down any abstract rule, it is sufficient to say we do not think this evidence should be admitted.

The 14th section of the Irish and 18th section of the English are almost the same.

[Mr. Levinge informs me that Lefroy, C. J., made a similar ruling in *Reg. v. Grey*, Trim Summer Assizes, 1855, having noted as the decision that the custom of constables interrogating prisoners should be discouraged, and even though caution be given, that the evidence should not be admitted.—REPORTER.]

Ireland.

COURT OF QUEEN'S BENCH.

January 19, 1857.

(Before CRAMPTON and PERRIN, JJ.)

REG. v. O'GRADY. (a)

Certiorari—Interested magistrate—Presence of—Disclaimer by.

At the hearing of a summons for an offence under the Fishery Acts, one of the magistrates, Sir H. D. M., was interested in the decision, and sat on the bench. He stated openly in court that he should take no part in the hearing of the case, but made an observation in the course of the case, that he could prove a material fact in controversy. He also remained and was present at the consultation of the magistrates. Sir H. D. M. stated that he took no part in the matter save as above stated, and that he did not vote upon the decision of the case.

Held, that notwithstanding the disclaimer, that he took such a part in the hearing as invalidated the conviction.

IN this case a conditional order for a *certiorari* had been obtained directing Sir Hugh Dillon Massy, Bart., and others, Justices of the Peace for the County of Clare, to remove into this court a certain conviction pronounced by the justices aforesaid, against Michael Hickey at a Petty Sessions, held at Doonass, in the said county, on the complaint of the said Hayes O'Grady, that the said Michael Hickey with others did, on the 13th March 1856, enter upon a several fishery situate at Ermagh, in the said county, for the purpose of fishing therein, not being authorized by the owner, lessee, or occupier thereof, as by law required.

The affidavits on which the rule was obtained stated that Michael Hickey had been summoned by Mr. O'Grady for trespassing on a fishery alleged by Mr. O'Grady to be a several fishery. That upon the hearing of the charge, Sir Hugh Dillon Massy was present on the bench, acting as a member of the court. That it further appeared on the statement of Mr. O'Grady's case, that Sir Hugh Massy was the owner in fee of the reversion of the fishery in question. That upon that hearing Sir Hugh Massy observed

(a) Reported by P. J. M'KENNA, Esq., Barrister-at-Law.

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that he had known persons to be fined 10s. for fishing on that part of the river. That Hickey was fined in the sum of 10s. or a fortnight's imprisonment, although his attorney had requested the fine to be increased to the sum of one pound, in order to give him an appeal to the Quarter Sessions. That in considering this request the court was cleared of all except the magistrates present, and that Sir Hugh Massy remained in court.

Sir Colman O'Loughlan, Q.C. (with whom J. Clarke, Q.C., and Charles Barry), now showed cause.—Sir Hugh Massy has made an affidavit and denies that he took part as a magistrate on the hearing of the case, or that he voted with the majority who decided on making the fine 10s. He swears "that he neither directly nor indirectly took any part on the hearing of said complaint, or the decision thereon, nor did he in any way influence said decision." He also states that no objection was made to his presence, and that if such had been made that he would have withdrawn; and that although owner in fee of the lands of Ermagh, and the fishery, that he had no interest in the matter, as there was a beneficial lease in perpetuity outstanding against him. He also charged that there was not a pretext for saying that the fishery was public. This conviction was in May last, and the applicant, who is a pauper put forward for the purpose of annoyance, has lain by all this time and is not now entitled to favour from the court.

Brereton, Q.C. (with whom James Murphy), in support of the order.—Sir Hugh Massy does not deny that he was present on the bench during the hearing of the case, although he disclaims having interfered. In *The Queen v. The Justices of Suffolk* (18 Q. B. 416), it was held that a magistrate who was interested in a question before the bench, acted improperly in having appeared upon the bench, spoken to the chairman, and referred to documents put in evidence; and although when his presence was objected to he retired from the bench, yet the proceedings were invalid. In *Regina v. Justices of Surrey* (1 Jurist, N. S. 1138), one of the justices present on the bench was interested in an appeal before the quarter sessions, and conversed with his brother magistrates in the course of the case. The magistrate in his affidavit stated that he did not recollect being present or conversing, but that he did not discuss the matter before the court; and it was held nevertheless that being present he formed part of the court, and therefore the order of sessions was invalid. The affidavits show there was no evidence to support a conviction, except the mere statement of Sir Hugh Massy, that he knew a man to be fined for fishing there.

Clarke, Q.C., in reply.—The prosecutor contends because Sir Hugh was present, that he was taking an active part; now this is completely negatived, neither has he the least interest in the matter. I have seen a peer sit on the bench when a case in which he was interested was being tried, and no objection was ever thought of. In the cases referred to, the magistrates took a more active part than Sir Hugh Massy did here. If a judge said that he was

unwilling to try a case, say concerning a railway in which he was a shareholder, and the parties made no objection, but went on with the case, could it be said all the proceedings were invalid. In *Regina v. Justices of Surrey* (1 Jurist, N.S. 1138), Wightman, J., threw out that if the magistrate had disclaimed taking any part it would make a difference. In *Regina v. Justices of London* (reported in a note to the case in 18 Q. B. 421), it was held that the mere presence on the bench of an interested magistrate, during part of the hearing of an appeal, is not sufficient ground for setting aside an order of sessions made on such hearing. Substantially the same parties as the applicant moved this court for a writ of prohibition to restrain the magistrates from adjudicating on this case, and being beaten on that motion they now resort to the present application, which is one entirely to the discretion of the court.

CRAMPTON, J.—One of the principal duties of this court is to control the acts of the inferior tribunals of this country, and it is of the greatest importance that they should not only be pure, but that nothing of private feeling should be at work in such tribunals. I believe Sir Hugh Massy stated what was true, and that what he did, did not amount to an interference in the decision of the bench. I do not see in the affidavits substantial grounds for coming to any such conclusion, but I think, as does my Brother Perrin, whether there was an actual interference or not, that the public might have been under the impression there was an interference by Sir Hugh Massy. I own my impression is that though he thought he did not interfere directly, he did so substantially, not in voting but in procuring the conviction. It is confessed he was interested in the result of the hearing, and thereupon he declared he would take no part, but sat on the bench. I am not of opinion that his merely sitting on the bench would be sufficient to invalidate the conviction, but having made the declaration that he would take no part, he sits on the bench, and when one of the witnesses for Hickey was making a statement about the fishery, he observed that he could prove that several persons had been convicted for fishing in the place mentioned. He might have said, I wish to be examined as a witness; but there on the bench, in the eye of the public, one of the bench, he states that he knew the evidence of a witness for the defence to be false. Nor can we think that such a statement had not any effect; I do not say it had, but it may have had an effect on the decision of the magistrates. This conviction was for the sum of 10s.; the party convicted was anxious to have an appeal to the assistant barrister, and for this purpose he wished the fine to be increased to 12., in order to give him an appeal. In order to permit the magistrates to consult on the propriety of yielding to this application, the court was cleared of all save the magistrates and their clerk. Sir Hugh Massy remains. I am satisfied he did not vote, because he says so, but would not the statement that he had known persons fined 10s. for an offence similar to that of Hickey's, furnish them with a precedent for

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imposing a similar fine. Mr. *Clarke* has pressed as an argument in his favour, that no objection was made to his presence, but I do not think that fact can take the case out of the principle. In remaining in the court with the other magistrates, I think he took a strong step which might have been misinterpreted. Why did he remain? It is quite possible that a man of his station might not have been aware of the influence which his expression of opinion, even his looks, might have had. At present we think that unless the parties come to some arrangement to save expense and litigation, we must make the order absolute. In doing so the title of the order, which is now incorrect, may be amended.(b)

PERRIN, J.—I agree with my brother Crampton that it is of the utmost importance that cases such as this should be carefully looked after. After the full and clear statement of facts by my Brother Crampton, I shall not go through them. The question here is, was Sir Hugh Massy's conduct on this occasion such as became a magistrate. He says, anticipating that his name would be mixed up with the case, he stated he would take no part in the proceedings. No doubt he thinks he is stating what he believes when he says he took no part, but what is his notion of taking a part? He admits that he suggested the 10s. fine, in order to get rid of the appeal. Then while a witness was establishing that the fishery was a public one, he stated he could prove that persons had been fined for fishing in that part of the river; that is, that he could contradict the witness on a most material point. It appears to me he took a most important part, independently of the circumstance of his being present when the court was cleared for the magistrates to consult.

Order absolute.

(b) The order should have been entitled *The Queen v. The Justices of Limerick*, and not *Regina v. O'Grady*, the prosecutor.

CENTRAL CRIMINAL COURT.

DECEMBER SESSION, 1856.

December 16.

(Before R. GURNEY, ESQ. RECORDER.)

REG. v. BROOKE. (a)

*Libel—Publication—Tendency to provoke breach of the peace—
Indictment.*

On the trial of an indictment for libel the only evidence of publication was the sending it in a letter addressed to the prosecutor himself, and the receipt of it by him.

Held, that there was sufficient evidence to go to the jury, although the indictment contained no allegation of an intent or a tendency to provoke a breach of the peace.

THE defendant was indicted for unlawfully publishing a false, scandalous, and malicious libel of and concerning Edward Mostyn Baron Mostyn. The indictment alleged that it was against the peace of our Lady the Queen; but there was no statement of its tendency to provoke a breach of the peace on the part of the prosecutor.

The libel was contained in a letter addressed to the prosecutor, which letter was received by him, but there was no evidence of publication to any other person.

Parry, Serjt. (*Cole* with him) for the defendant, submitted at the close of the case for the prosecution, that there was not sufficient evidence of publication to go to the jury. That publication to the prosecutor alone was not sufficient on such an indictment as this, and if it was intended to rely on the tendency of such a libel to provoke a breach of the peace that ought to be averred. He quoted the case of *R. v. Wegener* (2 Stark. 245), in which Lord Tenterden had held that a similar indictment was not sustained by similar evidence.

Ballantine, Serjt. (*Holl* with him) for the prosecution, contended that it was unnecessary for the indictment to contain an

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allegation that the libel had a tendency to provoke a breach of the peace, where it was clear, from the terms of it, that such a result was likely to be produced. In this case the libel had that tendency, and as it was alleged on the record that the offence was committed against the peace, that was all that was required.

Parry, Serjt. submitted that the indictment in the case quoted would have the same allegation, as it was part of the common form, but that would not cure the defect. It was absurd to say that a man was injured in his reputation by a letter that was only addressed to himself.

The RECORDER.—I am of opinion that it is not necessary to allege in the indictment that the publication of the libel had a tendency to provoke a breach of the peace. It is not suggested that the indictment is bad on the face of it, but merely that it is not supported by the evidence adduced. But the case cited by no means bears out that proposition. There the first count alleged that the libel was sent to the prosecutor, and that it was intended to injure him in his character of a solicitor. The second count alleged a publication generally, but with the same intent and tendency; and the court held that the averments were not supported by mere evidence of a letter sent to the prosecutor and received by him. That case rather strengthens the view I am disposed to take here, and I therefore decide that there is evidence of publication to go to the jury.

Serjeant *Ballantine* and *Holl* for the prosecution.

Serjeant *Parry* and *Cole* for the defendant.

COURT OF CRIMINAL APPEAL.

January 31, 1837.(Before POLLOCK, C.B., ERLE and WILLES, JJ., and
BRAMWELL and WATSON, BB.)

REG. v. GAYLOR. (a)

*Accessory before the fact — Manslaughter — Administering drugs with
intent to procure abortion—11 & 12 Vict. c. 46, s. 1.**The prisoner had procured certain drugs and given them to his wife, with
intent that she should take them in order to procure abortion. She
took them in his absence and died from their effects. On an indictment
against him for manslaughter, it was objected that he was only an
accessory before the fact, and that in law there cannot be an accessory
before the fact to manslaughter.**Held, that he was properly found guilty of manslaughter.*

THE following case was reserved by Mr. Justice Erle, at the
November Session of the Central Criminal Court:—

The prisoner Gaylor was indicted before me at the last November Session of the Central Criminal Court for manslaughter. The facts were that his wife's death was caused by swallowing sulphate of potash, for the purpose of procuring abortion, she believing herself to be pregnant, although in reality she was not. The prisoner purchased this sulphate of potash and gave it to his wife, in order that she might swallow it for the above-mentioned purpose, but he was absent at the time when she so swallowed it. For the prosecution it was contended that the wife committed a felony in so swallowing the sulphate of potash, and as death ensued therefrom she also committed murder: (*Re Russell*, 1 Moo. C. C. 348.) That the prisoner was an accessory before the fact to this felony, and to the consequent murder, and might be tried as if the principal had been convicted under 11 & 12 Vict. c. 46, s. 1, and that, although the evidence showed his offence was murder, yet

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

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that would support an indictment for manslaughter. Under my direction the jury convicted. The prisoner was discharged on recognizance, and I reserved for the opinion of the court the following questions:—

1st. Was the deceased guilty of felony in administering sulphate of potash to herself for the purpose of procuring abortion, she not being pregnant?

2nd. Was the husband by his act guilty of felony, or an accessory thereto, he having been absent when she swallowed the drug?

3rd. If the husband was an accessory to the felony was an indictment for manslaughter supported, it being laid down that there cannot be an accessory to manslaughter? (Hale's P. C.)

4th. Can the indictment be supported under 11 & 12 Vict. c. 46, s. 1?

If the answer to any of these questions shall entitle the prisoner to an acquittal, a verdict of Not Guilty shall be entered.

Nov. 15th.

W. ERLE.

Ribton, for the prisoner.—The third point is the principal one to be considered.

POLLOCK, C. B.—As to the first point, it appears by the case of *R. v. Goodhall* (1 Den. C. C. 187), that where there is an administering it is immaterial whether the woman was pregnant or not. But this is under a particular statute. The case of a woman taking a drug to procure abortion may be an offence at common law, but not so if she were not pregnant at the time. It is difficult here to see that the woman has committed any felony at all.

Ribton.—The case will probably in the end turn upon this, whether there can be an accessory before the fact of the crime of manslaughter. The prisoner was not present when the drug was taken, so that he could not be a principal.

ERLE, J.—If he could be convicted as an accessory before the fact to the murder, why may he not be convicted as an accessory before the fact to manslaughter?

Ribton.—Because there is no such crime known to the law. In Hale's P. C. 437, it is laid down that "in manslaughter there can be no accessory before the fact, for it is presumed to be sudden, for if it were with advice, command, or deliberation, it is murder and not manslaughter, and the like of *se defendendo*." How can I counsel a man to commit an act which in its very nature is unpremeditated? In *Bibeth's* case (in 4 Co. Rep. 43b), it is laid down that if A. be indicted for murder, and B. as accessory before, by procurement, &c., and A. is found guilty only of the manslaughter, B. shall be discharged.

ERLE, J.—What do you mean by unpremeditated? Take the case of a man going behind another and striking him a slight blow, which, nevertheless, kills him.

Ribton.—There the death is unpremeditated, although the blow is not.

ERLE, J.—The death is not intended in many cases of murder, and yet there may be accessories before the fact to it.

BRAMWELL, B.—Suppose A. counsels B. to give C. a strong dose of medicine, not for the purpose of doing him any further injury than causing him to be sick and uncomfortable for a time, and C. dies of the medicine so administered, would not B. be guilty of manslaughter; and, if so, would not A. be guilty of it?

ERLE, J.—It is clear that Lord Hale, in laying down the law in the passage cited, only alludes to cases of killing *per infortunium* or *se defendendo*. In other cases of manslaughter there seems to be no reason why there may not be accessories.

RIBTON.—There is nothing in the passage to lead to the conclusion that it was intended to be so limited.

He also referred to 1 East's P. C. 419, and *Goffe's* case, 1 Ven. 216.

Payne, for the prosecution.—It is obvious that there must be some limitation to the doctrine alleged to be laid down by Lord Hale; as for instance, in the case of a prize fight where a man encourages the combatants and departs before the death-blow is struck. So in the case of *mala praxis* in a medical man, or where by ignorance or carelessness in the sale of drugs, death ensues. As to the first point, it is a rule of law that wherever death arises from the act of any one, it is *prima facie* murder in the person committing the act. This woman, therefore, in doing an act which caused her own death, was *prima facie* guilty of murder: (*R. v. Russell*, 1 M. C. C. 348.)

POLLOCK, C. B.—How do you make out that? The woman never intended to kill herself. Suppose a man eats too much at dinner and dies in the night of apoplexy, is he guilty of murder? You must here make out that the act of taking a substance that was not intended to kill her was an unlawful act, on her part, because it did kill her. If I suppose that there is a person in an adjoining room and I fire a pistol through the doorway with the intention of killing him, and nobody is there, I have committed no crime. Morally, I should be just as guilty as if I had shot the man, but I should have done no act cognizable by the criminal law.

Payne.—But suppose a man under such circumstances acting on the intent to shoot some one else kills himself, that would be murder. The prisoner puts it in his wife's power to kill herself, surely he is then guilty of some crime if, in consequence of doing the act he contemplated, death ensues.

POLLOCK, C. B.—That may be another species of offence; but you have not satisfied me that, as far as the woman is concerned, she has been guilty of any offence at all.

ERLE, J.—The man is clearly guilty of being an accessory before the fact to the woman taking the drug with intent to procure abortion. This would, in my opinion, be murder, if she died in consequence of taking that drug. But the grand jury found that it was manslaughter. If a man is indicted for manslaughter, and it turns out to be murder, he may be found guilty of man-

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slaughter. In this case I thought he was guilty of murder by administering the drug, and might therefore be convicted of manslaughter.

Ribton.—If he is guilty of anything, it is of being accessory before the fact to murder. If he were to be subsequently tried for the murder he could not plead *autrefois convict*.

ERLE, J.—According to Foster's P. C. 229, he could. It is there laid down that an acquittal of manslaughter is an acquittal of murder. If the man were acquitted of the manslaughter, he might say—I did not kill the deceased at all.

Ribton.—The plea of Not Guilty in manslaughter does not mean that the prisoner did not slay.

Cur. adv. vult.

31st January.—The learned judges affirmed the conviction, but without giving their reasons for so doing, and the prisoner was afterwards sentenced to three months' imprisonment and hard labour.

Conviction affirmed.

Joseph Payne for the prosecution.

Ribton for the prisoner.

COURT OF CRIMINAL APPEAL.

April 25, 1857.(Before COCKBURN, C.J., COLERIDGE, CROMPTON, and
WILLES, J.J. and MARTIN, B.)

REG. v. FITCHIE. (a)

*Forgery—Uttering accountable receipt for goods—Pawnbroker's Duplicate.**A pawnbroker's duplicate given in the form prescribed by the statute 39 & 40 Geo. 3, c. 99, is an accountable receipt for goods within the statute 11 Geo. 4 & 1 Will. 4, c. 66, s. 10.**A. pledged goods with a pawnbroker, and upon redeeming them returned the duplicate. He afterwards discovered that he had not received all the goods which he pledged. He then summoned the pawnbroker before a magistrate; and upon the hearing of the charge an attorney attended for the pawnbroker, and in his presence handed up to the magistrate a fabricated duplicate as being the genuine duplicate which A. had received on pledging the goods. The jury having found that the duplicate handed up was fabricated, and that the pawnbroker did through the hands of his attorney deliver it to the justices as the genuine ticket:**Held, that he was properly convicted of uttering an accountable receipt for goods.***T**HE following case was reserved by Martin, B.:

The prisoner was indicted in the second count of the indictment for uttering an accountable receipt for goods, against the form of the statute.

In the fourth count the document was described as an accountable receipt for goods, to wit, an accountable receipt for goods usually known by the name of a pawn-ticket.

In the sixth count the document was described as an accountable receipt for goods usually called a pawnbroker's duplicate.

In the eighth count the document was described as a forged receipt for goods, to wit, a pawn-ticket.

In the tenth count the document was described as a warrant for the delivery of goods, to wit, a warrant usually known by the name of a pawn-ticket.

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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In the eleventh count the document was described as a forged acquittance for goods, and the document was set out as follows:—

WILLIAM FITCHIE, Pawnbroker,

No. 85, Church-street, Preston.

15th January, 1856.

Blanket, 2 Sheets, Counterpane 8s.

Elizabeth Hopwood, near Preston.

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1 | 10 5

And the meaning of this document was alleged by averment to be that Elizabeth Hopwood had pledged a blanket, two sheets and a counterpane with the prisoner for eight shillings, and that she had required the redelivery of the articles, and paid him the eight shillings advanced and one shilling and tenpence for profit. In all the counts the uttering was alleged to be against the form of the statute.

The facts proved were these—

On the 15th January, 1856, Elizabeth Hopwood pledged with the prisoner, who was a pawnbroker in Preston, three blankets, one counterpane, and one pair of sheets for eight shillings, and he gave her a ticket or note which a pawnbroker is required to give by the statute 39 & 40 Geo. 3, c. 99, s. 6, to the person pawning goods.

On the 26th November, 1856, Robert Hopwood, the husband of Elizabeth Hopwood, went to the prisoner's shop to redeem the goods, and took with him the said ticket or note, which he delivered to the prisoner. The prisoner stated that the interest was one shilling and tenpence, which Robert Hopwood paid together with the eight shillings, and the prisoner delivered to him a bundle tied up in a handkerchief. He brought the bundle home, and, upon opening it, it was found to contain only one blanket, one counterpane, and one pair of sheets, which were not the sheets pledged by Elizabeth Hopwood. In consequence of the non-return of the goods pledged, Robert Hopwood, in due form of law, took proceedings against the prisoner under the provision of the 14th section of the said statute, and the case in like due form of law came on to be heard before the justices, on the 3rd December, 1856. At the hearing the prisoner was defended by Mr. Ascroft, an attorney employed by him. The prisoner was present; and Mr. Ascroft in his presence, produced a ticket or note and handed it up to the justices, and stated that it was the ticket or note which the prisoner had given to Elizabeth Hopwood when the goods were pledged, and which Robert Hopwood had given back to him when he received the eight shillings and one shilling and tenpence, and when he gave

to Robert Hopwood the bundle containing the articles before mentioned.

The following is a copy of the ticket or note:—

WILLIAM FITCHIE, Pawnbroker,

No. 85, Church-street, Preston.

15th January, 1856.

Blanket, 2 Sheets, Counterpane 8s.

Elizabeth Hopwood, near Preston, H.L.

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The jury found, first, that the ticket produced before and handed up to the justices by Mr. Ascroft as before mentioned, as the genuine ticket originally given by the prisoner to Elizabeth Hopwood, and afterwards delivered back to him by Robert Hopwood, was not the genuine ticket but was a false and fabricated ticket.

Secondly.—That the prisoner did, through the hand of Mr. Ascroft, his attorney, deliver to the justices as being the genuine ticket the said false and fabricated ticket, he knowing it to be false and fabricated.

I request the opinion of the Court of Criminal Appeal upon the following questions:—

First.—Was the production and delivery of the document in the manner before mentioned by Mr. Ascroft before and to the justices, taken together with the finding of the jury, an uttering by the prisoner?

Secondly.—Was the doing so an offence as averred in any of the counts of the indictment before mentioned?

Monk, for the prisoner. First, there is no evidence of uttering by the prisoner.

COCKBURN, C. J.—We must take it that the fabricated document was shown to the magistrates with the prisoner's sanction.

Monk.—The court are to say whether there was any evidence to support the finding of the jury. Even assuming that the prisoner being present must be considered as sanctioning what was done by his agent, it does not necessarily follow that he would be involved in criminal responsibility for the act. Suppose that he had been asked for a blank form of duplicate, which had been filled up without his knowledge; would his mere acquiescence afterwards in the use made of it render him criminally responsible?

COLERIDGE, J.—I doubt whether mere acquiescence would have been, under the circumstances in which he was placed, evidence of an uttering by him; but the question put to us is whether the production and delivery of the document in the manner mentioned, "taken together with the finding of the jury," was an uttering by the prisoner; and the finding of the jury is that the prisoner did, through the hands of his attorney, deliver it to the justices as genuine.

MARTIN, B.—I agreed with you at the trial that if the act

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was really the act of the attorney and not of the prisoner, the latter was not guilty; but that was a question for the jury, and they found the fact against you.

Monk.—Still if Ascroft was a guilty agent in the matter, he alone actually uttered it, and he alone would be a principal in that offence.

CROMPTON, J.—They would both be principals. They were acting together.

Monk.—Then, secondly, the document itself was not one which could be the subject of an indictment for felonious forgery within the statute 11 Geo. 4 & 1 Will. 4, c. 66, s. 10. It purports to be a pawnbroker's duplicate, issued under section 6 of 39 & 40 Geo. 3, c. 99, which requires a pawnbroker, on receiving a pledge, to make an entry of certain particulars in a book, and to give to the person who pledges the goods a corresponding memorandum. It does not, upon the face of it, purport to be anything but what it is, viz., a memorandum of the names and descriptions of certain persons and goods as required by the Pawnbrokers Act.

COLERIDGE, J.—Does it not acknowledge the receipt of goods for which the pawnbroker is to be accountable?

Monk.—Not upon the face of it. It may be an invoice of goods sold for anything that appears upon the face of it; and if the facts are looked to, then it appears not to be an accountable receipt, because when it was produced, the money lent had been paid back, the goods pledged had been returned, and the transaction was closed.

MARTIN, B.—Then, supposing it to be an accountable receipt upon the face of it, and an action of trover being brought for the goods, a ticket is forged and produced for the purpose of protecting the wrong delivery, you say that it would not be an uttering within the statute.

Monk.—It would be if the document itself clearly appeared on the face of it to be one of those described in the statutes against forgery.

COLERIDGE, J.—But is not this pawn-ticket when it is first given out by the pawnbroker an accountable receipt for goods?

Monk.—That may be admitted for the purpose of this argument; but, in truth, it is only a copy of the entry which must be made in the pawnbroker's own book, and that cannot be a receipt.

CROMPTON, J.—Although the ticket does not in words acknowledge the receipt of goods, yet, to any person acquainted with the course of these transactions, it would, even upon the face of it, appear to be an accountable receipt.

Monk.—That is by the aid of matter *dehors* the instrument, and if it is necessary to resort to extrinsic evidence, then it must be shown to be an accountable receipt at the time when it was used. It is not denied that the real character of an instrument may be shown by proof of matter *dehors* the instrument; there are cases to that effect; but in such cases the instrument must be shown to have borne the particular character when it was used.

CROMPTON, J.—Then you contend that if such an instrument is forged for the purpose of fraud three years after the transaction to which it refers, there can be no conviction of felony under the statute.

Monk.—After the transaction is closed the instrument has lost its original character, if it was originally a receipt. In the hands of the pawnbroker it cannot purport to be an accountable receipt.

CROMPTON, J.—Yes; an accountable receipt returned to the pawnbroker.

Monk.—At the moment when it is returned, he ceases to be accountable.

COCKBURN, C. J.—I think that we must look to what was the character of the instrument at its creation. [MARTIN, B.—The document was still a pawnbroker's duplicate, though the transaction was at an end. COCKBURN, C. J.—And it is produced before the magistrates in answer to the charge as being the genuine document relating to the particular transaction.]

Monk.—But that is not a user of it as an accountable receipt; but a user of it for a purpose inconsistent with its being then an accountable receipt. To make the uttering of a forged instrument felony within the statute, the instrument forged must, at the time of committing the offence, be such as is described in the statute; but in the present case the facts establish that at the time when the offence is supposed to have been committed, this could not be an accountable receipt for goods.

COCKBURN, C. J.—If A. deposits money with B. and takes from him a receipt, which B. afterwards contrives to alter so as to reduce the amount, would not B. be guilty of uttering a forged receipt, if he produced the altered document as evidence in an action for the money brought by A.?

COLERIDGE, J.—*R. v. Ion* (2 Den. C. C. 475) is a strong case, because there certain forged tax receipts were shown only for the purpose of proving that a third person was a safe person to lend money to: (S. C. 6 Cox Crim. Cas. 1.)

Monk.—In that case the receipt continued in full force and efficacy as a receipt up to the time of committing the offence.

CROMPTON, J.—No forged instrument has any real validity; but this was produced by the prisoner as being an accountable receipt.

Monk.—Not as being so at the time when he produced it; only as an instrument which had once been so, but was so no longer.

No counsel appeared for the Crown.

COCKBURN, C. J.—We are all of opinion that the prisoner was properly convicted upon the counts which charge him with having uttered an accountable receipt for goods. The facts are plain. Elizabeth Hopwood pledges with the prisoner certain goods, receiving the usual pawn-ticket. In a few days her husband comes to redeem the articles; he pays the amount advanced with interest, restores the pawn-ticket to the prisoner, and receives what he supposes to be the articles pledged. But it turns out that part only have been returned; and upon that proceedings are taken

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before the magistrates to recover the remainder. In order to meet that demand the prisoner produces a false instrument, which is delivered by his attorney to the magistrates as being the genuine pawn-ticket which had been given to Elizabeth Hopwood. That is done in his presence and with his sanction; and is clearly as much an uttering as though it had been done with his own hand. But then the question is, whether this instrument is properly described as an accountable receipt for goods; and we are of opinion that it is. The Pawnbrokers Act requires that upon receiving goods in pledge, the pawnbroker should give a ticket in the form therein prescribed; and this document is substantially in the form required by the act. It is, therefore, a receipt for the goods pledged, and it is one upon which, after repayment of the money advanced with interest, the pawnbroker would be bound to account. It is clear then that this is an accountable receipt for goods, and that being so the case is within the statute respecting forgery; and the conviction must be affirmed.

The other Judges concurred.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

May 2, 1857.

(Before COCKBURN, C.J., COLERIDGE, CROWDER, and
WILLES, JJ., and BRAMWELL, B.)

REG. v. MILLS. (a)

False pretences—Money obtained, though the prosecutor knew the pretence to be false.

An indictment for obtaining money by false pretences cannot be sustained, if the prosecutor when he parted with his money knew the representation to be false.

AT the General Quarter Sessions of the Peace holden for the county of Cambridge, on the 9th January, 1857, William Mills was tried and convicted upon the following indictment for obtaining money under false pretences.

The jurors for our Lady the Queen upon their oath present, that William Mills, on the 14th day of November, 1856, did falsely pretend to one Samuel Free, that the said William Mills had cut sixty-three fans of chaff for him the said Samuel Free, by which said false pretence the said William Mills then unlawfully did obtain from the said Samuel Free certain money of him the said Samuel Free, with intent to defraud. Whereas, in truth and in fact, the said William Mills had not cut sixty-three fans of chaff, as the said William Mills did then so falsely pretend to the said Samuel Free, but a much smaller quantity, to wit, forty-five fans of chaff. And the said William Mills, at the time he so falsely pretended as aforesaid, well knew the said pretence to be false, against the form of the statute, &c. It appeared from the evidence that the prisoner was employed to cut chaff for the prosecutor, and was to be paid twopence per fan for as much as he cut. He made a demand for 10s. 6d. and stated he had cut sixty-three fans, but the prosecutor and another witness had seen the prisoner remove eighteen fans of cut chaff from an adjoining chaff-house, and add them to the heap which he pretended he had cut, thus making the sixty-three fans for which he charged. Upon the representation that he had cut sixty-three fans of chaff, and notwithstanding his knowledge of the prisoner having added the eighteen fans, the prosecutor paid him the 10s. 6d. being 3s.

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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the falsehood.

more than the prisoner was entitled to for the work actually performed. It was objected on behalf of the prisoner: first, that this was simply an overcharge, as in the case of *R. v. Oates* (6 Cox Crim. Cas. 540); and, secondly, that as the prosecutor at the time he parted with his money knew the facts, the prisoner could not be said to have obtained the money by the false pretence. Judgment was postponed, and the prisoner was discharged upon recognizances to appear at the next Quarter Sessions. The opinion of the Court of Criminal Appeal is requested whether the prisoner was rightly convicted of misdemeanor under the foregoing indictment.

No counsel was instructed for the prisoner.

Orridge, for the Crown.—Although the prosecutor knew that the representation was false, and permitted the prisoner to complete the offence by receiving the money, that does not render the offence less in him. In larceny the same doctrine is established, *R. v. Eggington*: (2 B. & P. 508.) [COCKBURN, C. J.—There the prosecutor remains passive. WILLES, J.—*Invito domino* is held to mean without leave.] In *R. v. Adey* (7 Car. & P. 140), it was said to be no answer that the prosecutor had laid a plan to entrap the prisoner into the commission of the offence.

COCKBURN, C. J.—The question in these cases is, whether the false representation is the immediate motive operating on the mind of the prosecutor, and inducing him to part with his money. It cannot be said that that was the case here, because he paid the money although he knew the representation to be false. Unless the money be obtained *by* the false pretence, it is an attempt only.

COLERIDGE, J.—In *R. v. Adey*, the prosecutor did part with his money in consequence of the false pretence.

BRAMWELL, B.—I do not think he could recover back the money in a civil action.

WILLES, J.—Because it was paid voluntarily with a knowledge of all the circumstances.
Conviction quashed.

COURT OF CRIMINAL APPEAL.

May 2, 1857.(Before COCKBURN, C.J., COLERIDGE, CROWDER, and
WILLES, JJ., and BRAMWELL, B.)

REG. v. COCKBURN. (a)

*Evidence—Absence of witness—Admissibility of deposition.**The deposition of a witness was received in evidence, upon proof being given by his medical attendant, that though he might have been brought to the court without danger to life, yet he was suffering from a second attack of paralysis, which disabled him altogether from giving evidence. Held, rightly received.*

THE following case was reserved by the Recorder of Berwick:—
At the last January Sessions for Berwick-upon-Tweed, Mark Cockburn was indicted for stealing money from the person of James Emery. The prisoner pleaded Not Guilty, and it was proposed at the trial to give in evidence the deposition of James Emery, which was proved to have been duly taken according to the provisions of the 11 & 12 Vict. c. 42, s. 17.

To prove the state of health of James Emery, a medical witness was called, who gave the following evidence:—I am a physician in attendance on James Emery. I saw him this morning—he is not able to attend here in consequence of illness, he cannot speak, and I have never been able to make him hear; it is a second attack of paralysis. He had a former attack ten months ago, from which he recovered tolerably, but was not so strong as before. If brought here he would not be able to give evidence, yet he might be brought here without danger to life, though I, as his physician, could not permit him to roam abroad if I knew it. At the suggestion of the prisoner's counsel, I examined another witness, who said that he had seen James Emery in the street on the preceding day near the door of his shop. On this it was objected, that as James Emery had been out of the house, and might be brought to court without danger to life, he was not so ill as not to be able to travel, according to the language of the statute, which was to be taken strictly, but that in such a case an application ought to have been made for the postponement of the trial: but I was of

(a) Reported by A. BITTLESTON, Esq, Barrister-at-Law.

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opinion that as it had been proved to my satisfaction, that at the time of the trial James Emery was disabled from giving evidence by an attack of illness not plainly appearing to be temporary, his deposition was admissible, whether he had power of travelling or not. The deposition was therefore given in evidence, and the prisoner was convicted. I postponed judgment, taking recognizance of bail for the appearance of the prisoner at the next sessions to receive judgment in case this court shall be of opinion that he was rightly convicted.

This case was not argued.

COCKBURN, C. J.—We are all clearly of opinion that the conviction is right. *Conviction affirmed.*

COURT OF CRIMINAL APPEAL.

May 2, 1857.

(Before COCKBURN, C.J., COLERIDGE, CROWDER, and
WILLES, JJ., and BRAMWELL, B.)

REG. v. TOOLE AND OTHERS. (a)

Evidence—Proof of prosecutor's Christian name by a witness who had seen him sign it.

Upon the trial of an indictment for robbery, the prosecutor himself being absent, the only evidence of his Christian name was this: that one of the witnesses had seen him sign the information against the prisoner, and also the deposition before the magistrates, and that the signatures to those documents corresponded with the names laid in the indictment. Held, admissible and sufficient evidence of the Christian name.

THE following case was reserved and stated by Channell, B. :—

Frederick Toole, Ambrose Lee, and John Reading, were tried before me at the last assizes for the county of Kent, on a charge of feloniously assaulting Thomas Bent, on the 19th February, 1857, and stealing from his person a watch, his property. The three prisoners on the night of the 18th, or morning of the 19th of February, in a public street at Chatham, violently assaulted a person then known to the several witnesses called for the prosecution, and who was described by them in their evidence as

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

Lieutenant Bent of the Royal Marines, of Her Majesty's ship *Iris*, then fitting out at Sheerness. For the purposes of this case it is to be taken, that from the person so known as Lieutenant Bent, the three prisoners stole a watch, his property. Lieutenant Bent was not called at the trial. It was proved that at the time of the trial he was in service in foreign parts on board the *Iris*. After the case for the prosecution was closed, it was objected by the counsel for the prisoners that no proof had been given of the Christian name of the prosecutor as described in the indictment. The prosecutor's counsel by permission recalled a witness named Richard Halse. He deposed as follows:—I know Lieutenant Bent of the Royal Marines. I saw him sign his name twice. I saw him sign this writing. [The writing referred to was a complaint and charge in respect of the same assault and stealing, for which the prisoners were tried before me, and was made by Lieutenant Bent against the prisoners, before certain magistrates of the county of Kent.] I saw him sign it at the magistrate's office. He signed it on Friday, the 20th of February. On the following day I saw Lieutenant Bent sign this writing. He did so in the presence of the prisoners. [This last writing was the deposition of Lieutenant Bent in support of the same charge, and was taken before the magistrates in the presence of the prisoners.] From these signatures I know his name to be Thomas Bent. On cross-examination the witness stated, except so far as I know the fact, from having seen Lieutenant Bent sign his name on these two occasions, I know nothing about his Christian name. So much only of the complaint and deposition was then read, as showed that the papers so proved to have been signed by Lieutenant Bent in the presence of the witness Halse, had been signed—"Thomas Bent." The prisoners' counsel objected to the admissibility of any part of either of the documents for any purpose. The above is the only evidence of the name of the prosecutor as laid in the indictment. I reserved for the opinion of the court the question as to the admissibility, and if admissible, the sufficiency of the evidence. The jury found the prisoners guilty. I respited sentence upon the conviction, and the prisoners are in custody. The question for the opinion of the court is, whether the above evidence was admissible, and sufficient evidence to prove the name of prosecutor as laid in the indictment.

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Proof of prosecutor's name.

Bushby, for the prisoner *Reading*, contended that neither the information nor the deposition was admissible in evidence, the prosecutor not being dead or insane or unable to travel, and that what he had written could only be evidenced by the writing itself. [BRAMWELL, B.—Suppose the witness, instead of seeing him write his name, had heard him make in open court a solemn affirmation in that name. COCKBURN, C. J.—Might you not prove the name of a Secretary of State by calling a clerk in the office?] His own statement of his name would be evidence against himself; but not against third persons; and with reference to

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utor's name.*

criminal charges, there are often circumstances which might induce a prosecutor to conceal his real name. [COLERIDGE, J.—That is only an observation upon the weight of the evidence.] If evidence of this description is received, the accused might be involved in great difficulty in making out a plea of *autrefois acquit* or *convict*, supposing him to be charged afterwards with the same offence, the prosecutor's name being altered.

No counsel was instructed for the prosecution.

COCKBURN,—C. J. We have no doubt that this evidence was admissible, though the weight of it may be open to some observations fit to be addressed to a jury; not that the documents as such are admissible; but that the statement of a witness who has seen another sign his name to a particular document which is produced, is evidence for the jury that the name attached to the document is one by which he was commonly known.

The other Judges concurred.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

May 2, 1857.

(Before COCKBURN, C.J., COLERIDGE, CROWDER, and
WILLES, JJ., and BRAMWELL, B.)

REG. v. FITCH. (a)

Larceny—Possession by adulterer of the wearing apparel of the wife. An adulterer who takes possession of none of the husband's property except the wearing apparel of the wife cannot be convicted of larceny. Upon an indictment for larceny of a bonnet and other articles of female apparel, it was proved that the prisoner, who was a lodger in prosecutor's house, agreed with his wife that they should go away and live together in adultery. He went away leaving the husband and wife together; she followed, and shortly afterwards the prisoner and wife were found together, the prisoner at that time carrying a box which contained her wearing apparel.

Held, that he could not be convicted of stealing those articles.

THE following case was reserved by Erle, J. The indictment was for larceny, in stealing a bonnet, boots, and goloshes, the property of James Reeve. The facts were, that the prisoner being a lodger in Reeve's house, agreed with his wife that they should go away and live together in adultery. He went away leaving the husband and wife together; then the husband went out to work, and then the wife went after the prisoner; they were followed and overtaken on the road in company together, and he was apprehended; and at that time he was carrying a bandbox containing goloshes and boots, the wearing apparel of the wife of the prosecutor, and so, in law, his property. The judgment was respited, the prisoner remaining in custody till the opinion of this court could be taken on the question, whether on these facts the conviction was right: (see *Thompson's case*, 1 Den. C. C. R. 549; 4 Cox Crim. Cas. 191; *R. v. Featherstone*, 1 Dearsley C. C. R. 369; 6 Cox Crim. Cas. 376.)

Tozer, for the prisoner.—This conviction is wrong on two grounds. 1st. There was no taking by the prisoner. 2nd. The goods charged to have been stolen were the mere wearing apparel of the wife.

COCKBURN, C. J.—Yes; in both the cases referred to the man was taking away the husband's money. Here he was carrying away only her necessary wearing apparel.

Tozer.—*R. v. Rosenberg* (1 Car. & K. 233) is also in point.

COCKBURN, C. J.—We are all agreed that this conviction cannot be sustained.

Conviction quashed.

COURT OF CRIMINAL APPEAL.

May 11, 1857.

(Before LORD CAMPBELL, C.J., COCKBURN, C.J., POLLOCK, C.B.,
COLERIDGE, CRESSWELL, CROWDER, CROMPTON, and WILLES,
JJ., BRAMWELL, WATSON and CHANNELL, BB.)

REG. v. SHERWOOD. (a)

False pretences—Sale of coal—Misrepresentation of quantity.

Upon an indictment for false pretences, it was proved that the prisoner, after having agreed with the prosecutor to sell and deliver a load of coals at a certain price per cwt., falsely and fraudulently pretended that the quantity which he had delivered was eighteen cwt., and that it had been weighed at the colliery, and the weight put down by himself on a ticket, which he produced, he knowing it to be fourteen cwt. only, and thereby obtained an additional sum of money :

Held, that he was properly convicted of the offence charged.

THE following case was reserved by Willes, J. :

Samuel Sherwood was tried before me at the last Stafford Assizes, for obtaining money under false pretences, upon two occasions, from Phœbe Smith. Each of the counts stated the pretence to be a false pretence, as to the weight of a quantity of coals sold and delivered by him. It appeared in evidence as follows:—The prisoner was a coal dealer. Upon the 24th of December, 1856, Phœbe Smith asked him to sell her a load of coals which he then had. He declined; but said he would fetch, sell, and deliver her one for 7d. per cwt. from a colliery where he was in the habit of buying; to which she assented; and he accordingly fetched and delivered to her a load actually, to his knowledge, weighing fourteen cwt. He, however, represented to her that the weight of it was eighteen cwt. and that it had been weighed out at the colliery, and he produced a ticket showing such to be the weight, which ticket he stated he had made out himself when it was weighed; Phœbe Smith thereupon paid him for the eighteen cwt.

Upon the 6th of February, 1857, there was a similar transaction, except that the coals delivered weighed only a ton, and were represented by the prisoner to weigh twenty-three cwt.

Upon each occasion the prisoner misrepresented the weight of

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

the coals, wilfully and fraudulently knowing them to be of the less weight, for the purpose of defrauding the buyer of the difference in the sum to be paid between the actual and represented weight; and he made the misrepresentation as to the weight of the coal verbally and by the ticket, for the purpose of defrauding the buyer and inducing her to pay more than the just price of the coals, and by such false pretences intending to obtain, and did obtain, the price in excess.

The counsel for the prisoner contended that this case was not within the statute, inasmuch as it was the case of a misrepresentation as to the quantity and value of an article agreed to be sold, and which was actually sold and delivered to the purchaser, and that the statute does not apply to misrepresentations made upon sales.

I was of the contrary opinion, and left the case to the jury, who convicted the prisoner.

But, being under the impression that doubt still existed upon the subject, notwithstanding the cases of *Burton* (1 Dears. & Bell, 11; 7 Cox Crim. Cas. 131), and *Roebuck* (1 D. & B.; 7 Cox Crim. Cas. 126), I reserved the matter for the consideration of the judges, postponed the judgment, and held the prisoner to bail: (see also *R. v. Eagleton*, 1 Dears. 515.)

This case was first argued on Saturday, May 2nd, by *Kettle* for the prisoner, who cited *R. v. Reed* (7 Car. & P. 848); and the court then directed that it should be reargued before all the judges from deference to the authority of that decision.

Powell for the prisoner.—This is not a false pretence within the statute 7 & 8 Geo. 4, c. 29, s. 53. At common law it is quite clear that a mere private imposition upon a purchaser, without the use of false weights or measures, by delivering a less quantity as and for a larger quantity was not indictable (*R. v. Wheatley*, 3 Burr. 1125; *R. v. Lara*, 6 T. R. 565); and the statute was only intended to get rid of “the subtle distinction between larceny and fraud.” In *Rex v. Osborn* (3 Burr. 1697), an indictment at common law for fraudulently selling coals of short weight, which was decided a few years after the passing of the analogous statute of 30 Geo. 2, c. 24, the judges suggested that such frauds deserved the attention of the Legislature, thereby showing that they did not think the case was within the existing statute. So in *Rex v. Bower* (Cowp. 323), the judges said that fraudulently selling wrought gold under the sterling alloy as and for gold of the true standard weight, was “not indictable” in an ordinary person, though it was in a goldsmith; which, as the statute 30 Geo. 2 was in existence, would seem to prove that they thought it was not indictable either at common law or under the statute. No case previous to *Reg. v. Kenrick* (5 Q. B. 49), would sustain the argument that this case was within the statute, and as the decision in that case was extra-judicial, it is not a binding authority, nor are the cases binding which were expressly decided upon it.

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- COLERIDGE, J.—Do you ask us then to overrule the recent cases?
 POWELL.—Yes.
- LORD CAMPBELL, C. J.—But what power have we to do that?
 POWELL.—It is submitted the court has full power to do so: (see *Foster v. Jackson*, Hobart's Rep. 59.)
- LORD CAMPBELL, C. J.—But was this court in existence in Hobart's time?
 POWELL.—The same principle is established in *Balne v. Hutton* (2 Cr. & J.) and in *O'Connell v. The Queen* (11 Cl. & Fin.)
- BRAMWELL, B.—Before you ask us to overrule these cases, had you not better try and distinguish them?
 POWELL.—Then it is submitted that they are distinguishable. *Reg. v. Burgon* (25 L. J. 105, M. C.; S. C. 1 D. & B. 11), was the case of a totally false pretence, which this was not. *Reg. v. Abbott* (1 Den. C. C. 273; 2 Cox Crim. Cas. 430), and *Reg. v. Roebuck* (1 D. & B. 24), were cases in which another and inferior thing had been substituted for the thing bargained for. Here coal was bargained for, and coal sold; only there was a false statement as to the quantity. All these decisions proceeded on *Kenrick's* case. Moreover, *Reg. v. Codrington* (1 C. & P. 661), shows that this is not a false pretence within the statute; and *R. v. Reed* (7 C. & P. 848), now admitted to have been decided by all the judges, is precisely in point, and a binding authority. In *Reg. v. Oates* (6 Cox Crim. Cas. 540; 24 L. J. 123, M. C.), Pollock, C. B. said the statute was not passed with reference to buying and selling transactions where there is a real bargain between the parties, and the whole matter is not bottomed in fraud. See also the judgments of Parke, B., and Wightman, J., to the same effect. The present case was one of a real bargain. The subject-matter of it was a load of coal, and that was what the prisoner sold; only he made an overcharge in respect of the quantity.
- COCKBURN, C. J.—It was sold by the load, but at so much per cwt.
 POWELL.—It was the bargain for the load that induced the prosecutrix to part with her money. The payment per cwt. was only the mode agreed upon for ascertaining the sum to be paid. Suppose he had said, "There is your load of coal; it weighs a ton—pay me 11s. 8d for it," it is submitted this would not be a false pretence within the statute.
- COCKBURN, C. J.—But if he had said "There, in that covered waggon is your load of coal," and she had paid for it, and it turned out that there was no coal in the waggon?
 POWELL.—That would have been a very different case to the present.
- COCKBURN, C. J.—Not as to the excess, which in this case had no more existence, than the whole would have in the case which I put. Suppose a man sold a flock of sheep at so much a head, and said there were a hundred of them, and there were but ninety?
- POWELL.—That is precisely the present case, and it is submitted

that the bargain is for the flock, and that the money is parted with in consequence of the bargain for the flock, and not of the false misrepresentation as to the number. Moreover, it is the case of a real bargain and not of a transaction altogether fraudulent, and the purchaser should have weighed the coals or counted the flock, and not have relied upon the statement of the seller. There does not appear to have been any misstatement as to any antecedent fact.

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CRESSWELL, J.—Yes; the case finds that he stated he had weighed it, and that he produced a ticket showing the weight to be eighteen cwt.

Lord CAMPBELL, C. J.—It seems to me to be a case precisely within the words of the statute.

Powell.—But the words “any false pretence” are not to be taken absolutely, otherwise they would include false pretences as to future conduct as well as of past transactions. Yet it is clear, according to the decisions, that if I say fraudulently I will go to York if you will give me 5*l.*, and so obtain the money, and do not go, that is not within the statute; whereas if I say that I have been, and so obtain the money, and I have not been, it is within the statute. The words of the statute, therefore, have a technical meaning only, and are restrained within it by judicial decisions.

McMahon, *contra*, was not called upon.

Lord CAMPBELL, C. J.—We have had some very nice cases to determine respecting this act of Parliament, the 7 & 8 Geo. 4, c. 29, s. 53, upon which great difficulty and doubt have arisen. In this case I can see no doubt or difficulty whatever; it seems to me to be clearly within the words and the spirit of the act of Parliament. I ought, perhaps, not to speak in such very positive terms, when I recollect that there certainly was a case, of *Reg. v. Reed*, in which a different construction had been put upon the act of Parliament, because I believe that was a case, very much like the present, upon the sale of coals and a misrepresentation of the quantity. But we do not exactly know how that misrepresentation arose, or how far that case may conflict with subsequent decisions; as it was, however, a case in respect of a similar fraud, my learned brothers, who constituted the court before whom this case was first brought, requested that it might be argued before all the judges, not liking to overrule what was said to be the decision of the twelve judges in the former case. Most likely that case, if investigated, would be found to differ essentially in its circumstances from the present; but if it were on all fours with the present, I must say I dissent from it, and must consider it to be overruled. Now here is an indictment for having obtained a sum of money by false pretences on the sale of coals. I must take the first transaction, which is thus described:—The prisoner was a coal dealer; upon the 24th December, 1856, Phœbe Smith, the prosecutrix, asked him to sell her a load of coals which he then had; he declined, but said he would fetch and sell and deliver to her one for 7*d.* a cwt. from a colliery where he was in the habit of

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buying. Well, then, the offer was to sell at 7*d.* a cwt., which she assented to, and he accordingly fetched and delivered to her a load, actually to his knowledge weighing fourteen cwt.; he, however, represented to her that the weight of it was eighteen cwt., and that it had been weighed out at the colliery; and he produced a ticket showing such to be the weight, which ticket he stated he had made out himself when the coal was weighed; Phœbe Smith thereupon paid him for eighteen cwt. Now I cannot doubt that this is a case in which the prisoner is proved to have obtained the sum of 2*s.* 4*d.* by a fraudulent representation, that being the sum that he received by saying that there were eighteen cwt. instead of fourteen cwt. It was a sale by the cwt.; and he stated a specific bygone fact which was within his own knowledge false, and which was most material to Phœbe Smith, namely, that he had seen the coals weighed at the colliery, and had put the weight eighteen cwt. upon the ticket, and that the price would amount to 28*s.*; well, then, he obtained the difference between the price of the fourteen cwt. and that of the eighteen cwt., by falsely and fraudulently representing a fact relating to it, which induced Phœbe Smith to pay that sum to him. This case seems, without any difficulty, to be within the act of Parliament; it is a case in which she parted with a sum of money which belonged to her, and which he obtained by a false pretence, with intent to cheat and defraud her of it. In *Reg. v. Reed*, if the conclusion come to was, that such a case is not within the statute, I must differ from that opinion. But I am relieved from supposing that that case is now overruled for the first time, because the cases of *Reg. v. Abbott*, *Reg. v. Burgon*, and *Reg. v. Roebuck*, have gone a great deal further, and must be considered as having overruled that case, if it ever was so decided. I have no difficulty in saying this is clearly a case within the spirit and letter of the act of Parliament.

COCKBURN, C. J.—I should have had no difficulty in dealing with a case of this kind, sitting in a court of criminal appeal consisting only of five judges, had it not been for the authority of *Reg. v. Reed*, in which there had been a decision of the twelve judges, that a fraudulent misrepresentation as to the quantity of goods sold was not within the statute relating to the obtaining money under false pretences. I think that that case, however, cannot now be sustainable. It was decided before the subject of obtaining money under false pretences, and the operation of the statute relating to such offence, had undergone sufficient consideration, and I think that, looking at the authority of the cases that have since been decided, and also looking to the language of the act of Parliament, a fraudulent representation as to the quantity of things sold will constitute a false pretence within the meaning of the act of Parliament. It is to be observed that it was not while selling the article that he represented the quantity to be greater than it was, but having sold the article and delivered it, when there comes to be a question about the price, he represents the quantity in excess four hundredweight; that representation, as to the excess

of four hundredweight, is equivalent to a misrepresentation as to the whole quantity, and is the same thing as if he had pretended to sell four hundredweight of coals, when, in point of fact, there were no four hundredweight; as in the case, put during the argument, of selling coals in a covered waggon, and representing them to be of a certain weight, when, in point of fact, there were no coals there. The case seems to me to be within the statute, and the prisoner was properly convicted.

POLLOCK, C. B.—I adhere to the opinion I formerly expressed, with reference to the meaning of the statute, that at the time it passed it was not intended to apply to transactions of buying and selling; but I think the distinction pointed out by the Lord Chief Justice of the Common Pleas just this moment obtains in the present case, and suggests to my mind another instance of a similar charge, where, though arising out of a transaction of buying and selling, I have no doubt that the statute was intended to apply, and that a conviction would be perfectly proper; that is, where, as here, the bargaining and selling is entirely over, and the goods will be transferred from the seller to the buyer upon the payment of the price of the goods; if the seller were to go and demand payment of the buyer, and the buyer were to say, "How much?" and the seller were to say, "So much," and he were thus fraudulently to say an amount different from that which had been agreed on, and that was for the purpose of obtaining more money for the goods, I think that would be a false pretence within the statute. I concur, therefore, in the judgment that in this case the conviction should be affirmed.

COLERIDGE, J.—I am entirely of the same opinion. I do not think it desirable there should be any misunderstanding with reference to the case of *Reg. v. Reed*. Lord Campbell has said it might be explained if we knew under what circumstances the false representation was made. In point of fact, the case is no doubt correctly reported, and the question arose in arrest of judgment on the face of the indictment, and therefore the case will stand or fall upon its own merits.

CRESSWELL, J.—This case is free from the difficulty we have had to encounter in those recently-decided cases, in which the majority of the judges said that they felt bound by authority and not by the reason of the thing.

ERLE, J., concurred.

CROMPTON, J.—I agree in the distinction pointed out in this case. I do not think it is because a false pretence is made with respect to a matter of fact arising out of or connected with a contract of sale, a conviction would not be good; there was indeed a contract of sale, but that was beforehand; and when he came and asked for the amount he misrepresented the price. That was seeking to get a larger sum than the price of the goods bargained for. It is very different from the case the Lord Chief Justice of the Common Pleas put when this case was discussed before: he said, supposing he employed a man to do ditching at one

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shilling a yard, there is a contract; when the man comes for his money at the end of the week he says, "I have done 5000 or 6000 yards," whereas he had only done 1000; by making this misrepresentation he gets the money under a false pretence; is he to be allowed to say that that is a simple case of contract of sale; and are we to apply the same reasoning to this case, and treat it as a mere contract of sale? We need not decide in this case what would be the effect of a false pretence in the course of the progress of a contract of sale; therefore, I think the conviction in this case should be affirmed.

CROWDER, J.—I am of the same opinion.

WILLES, J.—I concur in the judgment, but I wish not to be understood as acquiescing in the opinion that the existence of a contract of sale between the parties will prevent the obtaining money under false pretences, though in conformity with the contract, from being within the statute. I know the opinion of the late Chief Justice of the Common Pleas was to the contrary, and as at present advised I should say that the existence of a contract ought to make no difference.

BRAMWELL, B.—If the prisoner had not known that it was short weight, but had at first unconsciously made a misstatement respecting it, he would have been guilty of this offence if he afterwards had sold the coal and, having then found out the mistake, had persisted in the assertion that it was full weight, and thus got the money.

WATSON, B.—I think it is not open to us to reconsider the authorities. There are many difficulties notwithstanding those decisions; but I cannot say the conviction in this case is a wrong one.

CHANNELL, B.—I am of opinion the conviction should be affirmed. It seems to me clear that the prisoner obtained the money which he got for the coals by pretences which he knew to be false, and that he did that with intent to defraud. Those circumstances taken together *prima facie* bring the case within the statute. I think that the fact that those circumstances occurred after the antecedent contract of sale does not prevent its application, and render the conviction wrong. *Conviction affirmed.*

COURT OF CRIMINAL APPEAL.

May 2, 1857.(Before COCKBURN, C.J., COLERIDGE, CROMPTON, and
WILLES, JJ., and MARTIN, B.)

REG. v. LEWIS. (a)

*Manslaughter—Jurisdiction—Blow struck by a foreigner on the high seas—Death in England.**A., a foreigner, died at L. in England, of injuries inflicted by B., also a foreigner, on board a foreign ship whilst at sea.**Held, that neither section 8 of 9 Geo. 4, c. 31, nor section 1 of 2 Geo. 2, c. 21, was applicable to the case; and that the English court at L. had no jurisdiction to try B. for the offence.*

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal, by Martin, B. :—

The prisoner was indicted at the last Liverpool Assizes for manslaughter, and found guilty. He was a Frenchman by birth, and a naturalized citizen of the United States of America, and not a subject of the Queen. On the 21st December, 1856, he shipped on board the American ship *Guy Mannering* at New York, and signed articles to serve as an able seaman therein, on a voyage from thence to Liverpool. The deceased George also shipped on board the same vessel at New York, and signed articles to serve as a seaman therein for the same voyage. He was a German by birth, and not a subject of the Queen. The *Guy Mannering* was American owned and commanded by an American master, and sailed under the flag of the United States. Soon after the commencement of the voyage, the convict and others exercised much cruelty towards the deceased. The last act of cruelty proved, was committed four days before the *Guy Mannering* arrived at Liverpool, and when she was upon the high seas west of Cape Clear, Ireland. The *Guy Mannering* arrived in the Mersey on the morning of the 12th January, 1857, and the deceased died in a hospital at Liverpool in the afternoon of the same day, in consequence of the cruelty and violence committed upon him by

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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the prisoner during the voyage. The question upon which I request the opinion of the Court of Criminal Appeal is, whether the convict was subject to be tried and convicted at the assizes for Liverpool. The statute 9 Geo. 4, c. 31, s. 8, was relied upon on behalf of the prosecution.

No counsel appeared for the prisoner.

Aspinall for the prosecution.—There are two questions in this case. 1st. Was this offence triable by an English court before the statute 9 Geo. 4, c. 31? and 2nd, if not, did that statute, or the previous statute 2 Geo. 2, c. 21, make it so triable? Upon the first point there certainly does not seem to be any satisfactory authority to show that the offence would have been triable by English law before the statute. Now the first statute, 2 Geo. 2, c. 21, s. 1, provides that where any person, at any time after the 24th June, 1729, shall be feloniously stricken or poisoned upon the sea, or at any place out of England, and shall die of the same stroke or poisoning within England; or where any person shall be feloniously stricken or poisoned within England, and shall die of the same stroke or poisoning upon the sea or at any place out of England, in either of the said cases an indictment thereof found by the jurors of the county in England in which such death-stroke or poisoning shall happen respectively, shall be as good and sufficient as if such felonious stroke or poisoning, death thereby ensuing, had happened in the same county where such indictment shall be found.

COLERIDGE, J.—Before we consider the construction of these statutes, is it not necessary to inquire whether English acts of Parliament can have any binding authority upon foreigners on board foreign ships.

Aspinall.—There is great difficulty in the case; but these acts of Parliament are dealing with cases in which either the wound is inflicted in England or the death takes place in England. There was a case similar to the present tried at Liverpool a year ago, but no point was raised in that case. In its terms the statute 2 Geo. 2, c. 21, includes this case.

MARTIN, B.—It applies only to British subjects.

COLERIDGE, J.—The words “feloniously stricken” have reference to a technical term in English law. The word “felony” may not be known in the law of Germany.

Aspinall.—But the subsequent statute, 9 Geo. 4, c. 31, s. 8, seems to apply to foreigners as well as British subjects, because sect. 7 begins with the words, “if any of his Majesty’s subjects shall be charged in England with any murder, &c., committed on land out of the united kingdom, whether within the king’s dominions or without, it shall be lawful for any justice of the county where the person so charged shall be, to take cognizance of the offence,” &c.; but sect. 8 is not limited in the same way to “his Majesty’s subjects.” It enacts “that where any person being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England, shall die of such stroke, poisoning, or hurt in England, or being feloniously stricken, &c., at any place in

England, shall die of such stroke, &c., upon the sea or at any place out of England, every offence committed in respect of any such case may be dealt with, &c., in the county or place in England in which such death-stroke, poisoning, or hurt shall happen, in the same manner in all respects as if such offence had been wholly committed in that county or place." The introduction in sect. 7 of the words "his Majesty's subjects," and their omission from sect. 8 raises a strong inference that the latter section was not intended to be so limited.

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COLERIDGE, J.—But suppose that murder was not a capital offence by the law of the country to which the foreigner was subject, could this statute subject him to the punishment of death for that offence when not committed in any place within the jurisdiction of the English Crown?

MARTIN, B.—Suppose a mortal blow given on board a French ship by a Frenchman, the law of whose country makes no distinction between murder and manslaughter, how his he to be tried, according to English or French law?

CROMPTON, J.—Was not this matter discussed in *R. v. Helsham*: (4 Car. & P. 394; 1 Russ. on Cr. 553.)

Aspinall.—That case was decided upon sect. 7 of the statute.

CROMPTON, J.—The distinction between foreigners and British subjects seems to be observed in sect. 8, by the use of the words "feloniously stricken;" because as regards foreigners in a foreign country we have no authority to decide what is a felonious stroke, though as regards British subjects even abroad we have such authority.

COLERIDGE, J.—The reason for specially mentioning British subjects in sect. 7 is, that that section contemplates cases where the offence may be completed in a foreign country.

COCKBURN, C. J.—Taking the two sections together, they seem to provide—first, for the cases where the offence is wholly committed out of the jurisdiction; and, secondly, for those in which the blow being given out of the jurisdiction the death happens within it, or *vice versâ*, where the blow being given within, the death happens without; but there is no ground for saying that either provision applies to other than British subjects.

Aspinall.—It cannot be denied that there is great difficulty in so holding.

Cur. adv. vult.(a)

JUDGMENT.

WILLES, J., now delivered the judgment of the court.—We are of opinion that the conviction is wrong and ought to be quashed. The 8th section of the 9 Geo. 4, c. 31, was obviously intended to prevent a defeat of justice, which, without it, might have arisen from the difficulty of trial in cases of homicide where the death occurs in a different place from that at which the blow causing it was given; and that section ought not therefore to be construed

(a) *R. v. Depardo*, 1 Taunt. 26; *R. v. Azzopardi*, 1 Car. & K. 203; *R. v. Serva*, 1 Den. C. C. 104.

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as making a homicide cognizable in the courts of this country by reason of the death occurring here, unless it would have been so cognizable in case the death had ensued at the place where the blow was given; and the homicide in this particular case would have been by the 7th section so cognizable if the offender had been a British subject, but not otherwise. In the present case the injury which caused the death was inflicted by one foreigner upon another on board a foreign vessel upon the high seas, and consequently if death had then and there followed, no offence cognizable by the laws of this country would have taken place. The 8th section of the 9 Geo. 4, c. 31, therefore is inapplicable, and unless it be applicable, the conviction cannot be sustained. It must therefore be quashed and the prisoner discharged.

Conviction quashed.

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REG. v. M'PHERSON. (a)

*Indictment for housebreaking—Attempt to steal other goods of the
prosecutor than those mentioned in the indictment—Stat. 14 & 15 Vict.
c. 100, s. 9.**An indictment charged the breaking and entering of the prosecutor's
house, and stealing therein certain goods. The evidence was that all
those goods had been stolen by other persons before the prisoner entered
the house; and the jury found that he was not guilty of the felony
charged, but that he was guilty of breaking and entering the house,
and attempting to steal therein the goods of the prosecutor. There
were goods left in the house which he might have stolen, if he had not
been interrupted:**Held, that the conviction was wrong.***T**HE following case was reserved by the Recorder of Manchester:—

Andrew McPherson was tried before me at the Manchester City Sessions, on the 28th of February, 1857, on an indictment for breaking and entering, on the 19th of February, 1857, the dwelling-house of Mark Fowler, at Manchester, and stealing therein eight silver spoons, eight common spoons, one dress, one umbrella, two waistcoats, two brooches, and one pair of stays, his property, of the value of 10*l*. Prisoner pleaded not guilty.

The latter end of May the prosecutor went to spend some time in the country; the house in Manchester was locked up and left without any person in it. His wife came over to Manchester generally once a week to see that all was safe, and the last time she was there before the 19th of February was on Wednesday, the 11th. The house was then all right, and all the articles mentioned in the indictment safe, and in the places where she had left them. On the 19th of February, a little after five o'clock in the evening, prisoner and another man with him were standing at the front door of prosecutor's house; prisoner was next to the door and went into the house, the other man followed him into the house and pushed the door to behind him. The witness who saw this

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went directly to a Mr. Lord, who lived next door but one to the prosecutor's, and he went instantly to prosecutor's house; the door was not fastened; he pushed it open and went in, and saw the prisoner coming down stairs, and called out to him, "Holloa! what are you doing there?" On his calling out, the other man, who had entered with the prisoner, came out of the kitchen, rushed forcibly past the witness in the lobby, got out at the front door and escaped; the prisoner ran down the stairs and made for the back door; the witness followed, caught hold of his coat-cuff just as he got out at the door; prisoner's coat-cuff slipped through his hand, but he followed him, and prisoner fell about eighty yards from the house and the witness secured him. Upon the prisoner nothing whatever was found except a skeleton key, with which he had unlocked the prosecutor's door; the man who came out of the kitchen had nothing in his hands, and nothing had been taken out of the kitchen. On entering the house, after the prisoner was taken, the rooms up-stairs were all in confusion—things were very much upset, drawers broken open, and to such an extent, both there and in the parlour down stairs, as to make it quite impossible that all this could have been done by the prisoner and his companion between the time that they entered the house and the time when they were disturbed by Lord, which could not have been more than from two to three minutes. All the articles mentioned in the indictment were missing, and with the exception of the umbrella, which was taken from the parlour, had been stolen from different rooms up-stairs. And the jury were of opinion that all the articles mentioned in the indictment had been stolen from the house by some person or persons, whom they could not say, before the time when the prisoner so broke and entered it as aforesaid. There were other goods and chattels of prosecutor's still remaining in the house, which the prisoner might have taken. The jury, by their verdict, found that the prisoner was not guilty of the felony charged, but that he was guilty of breaking and entering the dwelling-house of the prosecutor, and attempting to steal his goods therein.

The question for the opinion of the court is, whether this verdict can be supported on this indictment, none of the articles named in the indictment having been in the prosecutor's house at the time it was so broken and entered by the prisoner. Sentence is deferred—the prisoner remains in gaol.

No counsel appeared for the prisoner.

Taylor, for the Crown. — The conviction may be sustained under the recent statute, 14 & 15 Vict. c. 100, s. 9; which authorizes the jury to find a prisoner guilty of an attempt, if the evidence fails to establish the complete offence charged. In this case, therefore, the prisoner was lawfully convicted of breaking and entering the house and attempting to steal.

COCKBURN, C. J.—To steal what? Not the things mentioned in the indictment, for they had been all stolen before he entered.

Taylor.—The things which were still in the house.

COCKBURN, C. J.—Upon an indictment for breaking and enter-

ing a house and stealing certain goods, can the jury find the prisoner guilty of attempting to steal other goods?

COLERIDGE, J.—Would you say that upon an indictment for a rape upon A. B., the prisoner must be convicted of attempting to ravish C. D.?

Taylor.—No; because the two offences are perfectly distinct. Here the offence is the same; because the prisoner broke in with the intention of stealing any goods which might be there.

COLERIDGE, J.—But you must not confound the offence of breaking and entering with intent to steal with that of attempting to steal.

Taylor.—The only difficulty in the case arises from the description of the goods in the indictment; but that description is mere surplusage, and need not be proved with reference to the offence of which the prisoner is convicted.

BRAMWELL, B.—Can he be convicted of attempting to commit that which was an impossible offence?

Taylor.—The impossibility is no answer. The attempt is equally culpable, though under the circumstances of the particular case it turns out that it could not be successful.

CROWDER, J.—There is a clear distinction between the language of section 9 and that of section 11 of the statute.

Taylor.—The indictment would be perfectly good if it said that the prisoner broke and entered the dwelling-house with intent to steal therein the goods of the prosecutor. Therefore the specification of particular articles may be rejected, and the indictment treated as if it were in the form above mentioned.

COLERIDGE, J.—Would an indictment for stealing do in that form?

Taylor.—No; the particular goods must be specified.

COLERIDGE, J.—Then why is the description unnecessary in an indictment for attempting to steal?

Taylor.—Because an attempt to steal may be made, though, in fact, no goods are there; and until the attempt is successful, it might be impossible to state what goods the prisoner intended to take.

COCKBURN, C. J.—The attempt meant by the statute is surely an attempt to commit the particular felony charged.

Taylor.—Yes; in this case it must be an attempt to steal—but not necessarily the specific goods mentioned in the indictment; for breaking in with intent to steal is in itself an attempt to steal, though the particular property intended to be taken cannot be stated.

COLERIDGE, J.—The difference is between burglary and house-breaking. In the former, the breaking and entering with intent to steal is the substance; in the latter, the stealing is; and when the stealing is the substance, the particular goods must be specified.

Taylor.—It is so as regards the complete offence; but it is submitted, not so as to the attempt.

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BRAMWELL, B.—It seems to me to be a legitimate conclusion, from this argument, that if I strike a vigorous blow at a log of wood, supposing it to be a man's head, I should be liable to be convicted of an attempt to commit murder.

Taylor.—An argument may be drawn from section 11 of the statute, which, in its very terms, would be confined to assaults with intent to rob; yet it has been held under that section, that persons might be convicted of any aggravated assault.

COLERIDGE, J.—Because they are included in the charge contained in the indictment.

Taylor.—In substance, the charge is stated in this indictment.

COCKBURN, C. J.—This conviction cannot be sustained. The prisoner was indicted for breaking and entering a dwelling-house, and stealing therein certain specified chattels; but the jury have found that, though he broke and entered with intent to steal, before he did so somebody else had taken away the articles which he was charged with stealing. Now, by the recent statute, it is provided that if upon an indictment for felony the proof fails to establish the completion of the offence, but makes out an attempt, the prisoner may be convicted of the attempt; but that means an attempt which, if successful, would have been the offence charged; and here the attempt never could have ended in the complete offence charged. That is the answer to the argument for the prosecution. The prisoner might have been convicted of an attempt to steal upon this indictment if the goods had been there, but as they were not, he could not properly be convicted of attempting to commit the felony charged.

COLERIDGE, J.—I am of the same opinion. This was an indictment for breaking and entering the prosecutor's house and stealing therein certain specified things; but the stealing of those things was not proved; and the jury therefore found the prisoner not guilty of the stealing charged; but it is said that he might upon this indictment and evidence be properly found guilty of breaking and entering and attempting to steal; but to steal what? Surely the things charged in the indictment to have been stolen. The fact however is, that the prisoner failed to complete the offence charged, because the goods were not in the house at the time; and though it is found that there were other articles of the prosecutor's there, an attempt to steal them is not an attempt to steal the specified goods, of which alone he could be convicted upon this indictment.

CROWDER, J., concurred.

WILLES, J.—The statute provides that if the evidence fails to establish the complete offence charged, but proves an attempt to commit it, the prisoner may be convicted of that attempt; and in order therefore to convict the prisoner under that section there must have been an attempt to steal the goods specified in the indictment. I have no doubt that the prisoner committed the offence of attempting to steal such goods as were left in the house

when he entered; and that he might have been indicted at all events for a common law misdemeanor, according to the decision of *R. v. Roberts*: (25 L. J. 17, M. C.; 7 Cox Crim. Cas. 39.)

BRAMWELL, B.—I am of the same opinion. I do not doubt that an indictment in a general form, charging that the prisoner broke and entered with intent to steal the goods of the prosecutor, would be a good indictment; and the argument which has been founded upon that is this—that the statement in the indictment of the specific goods is mere surplusage, and may be rejected. But it seems to me that that argument may receive this answer: it is not surplusage, because it is part of the description of the offence charged. Suppose an indictment to charge that the prisoner broke and entered the house with intent to steal certain specified goods therein; and upon the trial the fact turned out to be that the goods were not there. I should say that that would be a variance; and if it would be a variance in that case, surely it is a variance in this, where the indictment necessarily charges the stealing of particular goods, and it is sought to convict of an attempt to commit that offence, within the statutory provision.

Conviction quashed.

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—Attempt—
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COURT OF CRIMINAL APPEAL.

May 2, 1857.(Before COCKBURN, C.J., COLERIDGE, CROMPTON, and
WILLES, JJ., and MARTIN, B.)

REG. v. HUGHES.

*Perjury—Jurisdiction—Application for order of affiliation—Residence of applicant.**The mother of a bastard having been resident with her parents in one Petty Sessional division, went to lodge at D. in another division for the purpose of affiliating her child, D. being nearer and more convenient for her than the place where the magistrates acting for the other division met. She lodged at D. three weeks before she obtained the summons, having in the interval made one unsuccessful application; and after obtaining the order went into service in the division in which her parents resided, but without returning to them; and she stated that she could not go back to them as they had nothing for her to do. Whilst at D. she had no other home.**Held, that under these circumstances the jury were warranted in finding that at the time of her application to the magistrates at D. she was residing within that Petty Sessional division; that, consequently, the magistrates had jurisdiction, and a conviction for perjury committed by her on that occasion was right.*

THIS case was reserved by Bramwell, B. :—

The prisoner was convicted before me at the last Assizes for Merionethshire, on an indictment for perjury on an affiliation summons. The statutes are 7 & 8 Vict. c. 101, s. 2, and 8 & 9 Vict. c. 10, s. 10.

The applicant, the mother of the child, had been in service, where she continued till she returned to her parents to be confined. She was delivered of a child March 21, 1854, and continued to reside with her parents till November, 1854, and during that time had no other home. She then went to lodge at Dolgelley for the purpose of affiliating the child. The petty sessional division to which she applied included Dolgelley, but did not include the residence of her parents. Her going to Dolgelley and lodging

there was not fraudulent or for any improper reason, but because the magistrates met in the town, and it was more convenient for her than to go a distance from the home of her parents to the place of meeting of the magistrates for the division in which her parents resided. After the order of affiliation she went into service without returning to her parents. She stated she could not go back to her parents as they had nothing for her to do, but that she meant to leave immediately after the order was made, and that she did leave the next or following day. The summons was applied for and issued December 5th, three weeks after she first came to lodge at Dolgelley. The jury found she had no other home than Dolgelley, and that she was residing at Dolgelley, if in point of law she could under the circumstances be considered to be so. It was objected that she was not residing within the petty sessional division to which she had applied, and, consequently, that the magistrates had no jurisdiction. I reserved that question for the Court of Criminal Appeal, but passed sentence on the prisoner.

Morgan Lloyd for the prisoner.—It is submitted that the prisoner cannot be considered as a resident at Dolgelley when the application was made. She went there not with the intention of remaining there, but for the purpose of obtaining the order only. To hold that a woman who goes to a particular place for the sole purpose of obtaining an order there, acquires by so doing a sufficient residence there to give the magistrates of that place jurisdiction would defeat the very purpose of the enactment and enable the mother of a bastard child to harass the person, whom she chose to charge as the putative father, with applications all over the kingdom at any distance from the place where he resided and where she was known. [COLERIDGE, J.—The length of time during which she remained must be an element in the consideration.] The residence must have some character of permanency about it: (*R. v. The Duke of Richmond*, 6 T. R. 360.) In this case she is said to have been there three weeks; but that is explained by the fact that she had during that time made one application which was refused. [BRAMWELL, B.—That may be taken as a fact in the case.] Then as soon as she had obtained the order she returned to the division in which she had previously resided, though not to her parents' house. [BRAMWELL, B.—That was because she got service there. She meant to go wherever she could get service.] But as she had no intention of remaining at Dolgelley, the inference is that she meant to return to the place where she was living before; and the merely temporary absence at Dolgelley could not be considered as having interrupted her residence in the other district at the time when she made the application.

COCKBURN. C. J.—I am of opinion that this conviction is right. I quite agree that under this statute it is not competent to a woman, who seeks for an order upon the putative father, to go away from the place where she resides in order to avoid the

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jurisdiction of the magistrates of the district where she resides, or for the purpose of harassing the man whom she alleges to be the putative father; but here it is expressly found that she did not go to Dolgelley fraudulently or for any improper reason, but because Dolgelley was nearer to her parents' residence, and therefore more convenient for her. Then she lives there for the short period necessary to enable her to make the application; and during that time it is found that she had no other home. Now, taking that state of facts, I think she was residing at Dolgelley within the meaning of the statute. If not, women having no settled home, but moving about from place to place, would be deprived altogether of the remedy given by this statute.

COLERIDGE, J.—I am of the same opinion. The question is, whether at the time of the application she was resident within the division. Now Mr. *Lloyd* relies upon the fact stated in the case, that she came there only for the purpose of making the application; and he treats that as conclusive to show that she was not resident there; but he is mistaken, I think, in supposing that the purpose for which she came there is at all conclusive upon the subject. Suppose that she went into the district for the purpose of making application and for that purpose only in the first instance, but that having gone there she at once got a service and lived there twelve months, in that case she would surely have resided in the district for that time, and there only she could make her application. In the absence of fraud, the mere purpose for which she comes is not material; and in this case, although the period of her residence in the district was short, yet as she had no home elsewhere, I think she was for that short period resident in the district within the meaning of the statute.

CROWDER, J.—As the jury have found that she had no other home, she did not reside elsewhere than in the district where she applied for the order; so that the question is reduced to this—whether she had any residence at all within the meaning of the statute; and I think that under these circumstances her residence was in the district in which she was actually living at the time.

WILLES, J.—It has been argued that she was residing with her father at the time of the application; but it appears to me that she was neither actually nor constructively resident with her father.

BRAMWELL, B.—The case may be put thus:—the Legislature has assumed that every one resides somewhere; but it is found that the prisoner resided nowhere but in Dolgelley; therefore she resided at Dolgelley.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

May 11, 1857.(Before COCKBURN, C.J., COLERIDGE, CROWDER, and
WILLES, JJ., and BRAMWELL, B.)

REG. v. KAY. (a)

*Larceny or false pretences—Obtaining by fraud a watch sent through the post-office.**A. having bought a watch in London returned it to the seller to be regulated. B. fraudulently wrote in the name of A. to the seller, requesting him to send it in a letter to the post-office at C., and on its arrival at C. personated A. and received the watch :**Held, that B. was guilty not of obtaining by false pretences but of larceny, in taking the watch by fraud from the postmaster, as the postmaster was the mere servant of the true owner, and if the seller had any special property in the watch, it ceased when he sent it through the post.*

THE following case was reserved by Bramwell, B. :—

The prisoner was tried before me at the last assizes for Ruthin, on an indictment which charged him with stealing a post letter and a watch, laid to be the property of the Postmaster-General, and in another count of Thomas Jones.

Thomas Jones had bought a watch in London, which requiring some regulating, he had sent to the seller, named Myers. A letter was written by some person in his name and without his authority, requesting the seller to return the watch to him, Thomas Jones, in a letter directed to the care of the postmaster at Brymbo. After this letter had been written, the prisoner and a person who falsely represented himself to be Thomas Jones, came to the Brymbo post-office and asked for the watch. It had not arrived, and the man personating Thomas Jones, requested that when it did, it might be delivered to the prisoner. This was accordingly done by a clerk at the post-office at the prisoner's request next day, on the arrival of the watch. It must be taken that the writing of the letter, the personation of Thomas Jones, and application for

(a) Reported by A. BITTLESTON, Esq.; Barrister-at-Law.

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the watch, were parts of the same scheme, and that the watch was sent to Brymbo by the seller in pursuance of the fraudulent letter.

On this and other evidence the prisoner was convicted. But it having been objected, that if any offence had been committed, it was not stealing, but obtaining goods under false pretences, I entertaining doubts thereon discharged the prisoner on bail, and reserved the question for the opinion of the Court of Criminal Appeal.

M'Intyre, for the prisoner.—The prisoner's offence was not larceny, but an obtaining of the watch by false pretences. The postmaster had a special property in the watch whilst it remained at the post-office; and his duty was to deliver it to the party who applied for it in the right name. He therefore parted with the property, and the case was one of false pretences only. It is like the cases of delivering a letter by mistake to a wrong person: (*R. v. Mucklow*, 1 Moo. C. C. 160; *R. v. Davis*, 25 L. J. 91, M. C.) So the seller in London was induced to part with it by the fraudulent letter, and he likewise divested himself of his special property: (*R. v. Adams*, 1 Den. 38.) If it had been his own watch and had been so obtained, the offence unquestionably would have been false pretences (*Atkinson's case*, 2 Russ. 35); and in this case the prisoner must be taken to have obtained it from the owner, because both the seller in London and the postmaster had a special property in it; and both parted with the property. [BRAMWELL, B.—The bailment of the seller being determined by his wrongful act, the property was revested in the true owner.]

COCKBURN, C. J.—This seems very like the case of a person falsely pretending to a bailee that he came from the bailor, and so obtaining the money or goods of the bailor.

COLERIDGE, J.—Would it not have been larceny if the postmaster had taken and appropriated the watch.

M'Intyre.—No; because it came into his hands lawfully by bailment: (*R. v. Thistle*, 1 Den. C. C. 502.) Here the prisoner must be taken to have obtained it from the owner by false pretences.

BRAMWELL, B.—You say that this case does not fall within the class of cases, in which a clerk is induced by false pretences to part with his master's property contrary to his authority.

M'Intyre.—Certainly; and for two reasons. 1st. Because the postmaster has a special property, and is sufficiently the owner for this purpose; and the delivery by him or his servants to the person applying for it, is a parting with the property which prevents the offence from being larceny.

WILLES, J.—But in *Lane v. Cotton* (1 Ld. Raym. 846), it is held that the Postmaster-General is not answerable to the Queen's subjects as a bailee, like ordinary carriers.

M'Intyre.—Then, secondly, he stands in the position of the London seller, Myers, who also had a special property, and for the purpose of this case may be regarded as if he were the real owner; and the obtaining from Myers by means of the false letter in the name of Jones was not, according to *R. v. Adams*, larceny.

BRAMWELL, B.—There is no count laying the property in Myers.

COCKBURN, C. J.—The postmaster does not part with the property to the false Jones; but he intends to deliver to the true owner.

M'Intyre.—He voluntarily parts with the possession and intends to part with the property to the person applying, because he believes him to be the agent of the real owner.

BRAMWELL, B.—The seller sends the watch down to Brymbo for the false Thomas Jones, because he has already been imposed upon by the letter, and supposes it to come from the owner of the watch. That shows that in sending the watch away he did what he ought not to have done. By that wrongful act he at once determined his bailment, and the property vested once more in the real owner, Jones.

COLERIDGE, J.—In the case of false pretences, the true owner intends to part with the property to the prisoner.

WILLES, J.—If trespass would lie for the taking, then the offence would be larceny.

M'Intyre.—Without admitting that to be a certain test in all cases, it may be adopted in the present, for trespass would not lie because the property was parted with voluntarily by one who had a special property.

WILLES, J., referred to Com. Dig. Trespass, D.

No counsel appeared for the Crown.

Cur. adv. vult.

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JUDGMENT.

COLERIDGE, J., now delivered the judgment of the court.—We are of opinion that the prisoner in this case was rightly convicted of felony. Thomas Jones, the owner of a watch, had placed it with the seller for a specific purpose, the regulating it; and as it is not stated that he had given any specific directions when or how it was to be returned, it must be taken that the seller had no authority to deliver it to any one but Thomas Jones, or some one commissioned by him to receive it. By the fraud of the prisoner he is induced to believe that Thomas Jones had desired him to send it by post to the postmaster at Brymbo, enclosed in a letter addressed to Thomas Jones; the postmaster also, induced by the fraud of the prisoner, delivers the watch to him, believing him to be Thomas Jones or his agent, and thus the possession is obtained. Now assuming it to have been correctly contended in the argument, that the seller of the watch had more than a bare charge and was the bailee of it, yet his special property has not put an end to the general property of the true owner; and when he sent the watch away to a third person, addressed to the true owner, intending such third person to deliver it to the true owner, and that third person, the postmaster, received it for that purpose, the seller's possession and right of possession and special property all ceased, the general property of the true owner became entirely unencumbered and drew to it the possession; unless the postmaster himself became

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the bailee as the seller had been before. But this he did not, according to *Pearce's* case (2 East, P. C. 603), where the prisoner, pretending to be a mail guard, obtained from the postmaster the bags of letters, and was held to have been rightly convicted of stealing letters out of the post-office, the postmaster having no property in them, but only a charge. Although the prisoner had, by fraud, induced the seller to part with his special property, assuming that he had such, yet no possession had thereby, in fact, become vested in him; and when the possession, in fact, had come to the postmaster, it would be unreasonable to hold that the prisoner, by calling himself Thomas Jones, and falsely pretending to be the true owner, had made the postmaster his servant and agent, or the postmaster's actual possession his, since the postmaster had received it for the true owner and intended to deliver it to the true owner. The postmaster being the servant of the true owner for this purpose, his possession was the possession of the true owner, and could not be divested by the tortious taking from him, according to *Wilkins's* case: (2 East, P. C. 673, 674.) On this ground the prisoner's offence appears to have been clearly larceny.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

May 30, 1857.(Before Lord CAMPBELL, C.J., ERLE, WILLIAMS, and
CROWDER, JJ., and BRAMWELL, B.)

REG. v. EVANS. (a)

*Professing to act under pretence of County Court process—Felony—
Statute 9 & 10 Vict. c. 95, s. 57.**In order to convict a person of the offence of acting or professing to act under any false colour or pretence of the process of the County Court, under s. 57 of 9 & 10 Vict. c. 95, it is not necessary to show that the document used bore any resemblance to the actual genuine process of that court; it is enough if he falsely and fraudulently pretends that process has issued, and that in what he does he is acting under such process.**When therefore A., in order to obtain payment of a debt, sent to B., his debtor, a letter, partly written and partly printed, having at the top of the page the letters V. R. and the royal arms, and containing notice to B. that if the debt was not paid "proceedings would be taken in pursuance of the provisions of the stat. 9 & 10 Vict. c. 95, the New County Court Act for the more easy Recovery of Small Debts; which letter purported to be signed, "F. M., clerk to court, instructed by A.;" and afterwards represented to the wife of B. that he had ordered the court to send that letter, and then obtained payment of the debt, and made a claim of 1s. 3d. in addition for County Court expenses:**Held, (BRAMWELL, B. dissentiente) that A. was properly convicted of acting and professing to act under false colour and pretence of the process of the County Court, although the letter which he sent bore no resemblance to a genuine County Court summons, or to any process of that court.*

THE following case was reserved by Lord Powis, as chairman of the Montgomeryshire Sessions.

The prisoner was tried before me and others of Her Majesty's Justices of the Peace for the county of Montgomery, at the General Quarter Sessions of the Peace for the said county, holden at Welchpool on the 10th day of January last, upon a charge of

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having acted under a false colour and pretence of the process of the County Court of Montgomeryshire, holden at Welchpool.

The following is a copy of the indictment:—

Montgomeryshire, } The jurors for our Lady the Queen upon
to wit. } their oath present, that John Evans, late of
the parish of Llanfair, in the county of Montgomery, joiner,
on the 23rd day of October, in the year of our Lord one
thousand eight hundred and fifty-six, acted and professed to
act under a false colour and pretence of the process of
the County Court of Montgomeryshire, holden at Welchpool, in
the manner and by the ways and means hereinafter mentioned,
that is to say, for that one John Roberts being at the time of the
committal of the offence hereinbefore alleged indebted to the said
John Evans in a certain sum of money, the said John Evans in
order to obtain the payment of the said money did send to the said
John Roberts a letter or application demanding payment of the
money so due to him, the said John Evans, from the said John
Roberts as aforesaid, and which letter or application was in the
words or to the effect following, that is to say:—

Welchpool, Oct. 17th, 1856.

[V. (Royal Arms) R.]

To Mr. John Roberts.

Sir,—I hereby give you notice that unless the amount of
your account, 0l. 10s. 0d., which is due to me, is paid on or before
the 23rd inst. to me at the Quarry, proceedings will be taken to
obtain the same in pursuance with the provisions of the statute
9 & 10 Vict. c. 25, of the New County Court Act for the more
easy Recovery of Small Debts, &c. Yours, &c.,

FREDERICK MUGLISTON,

Instructed by John Evans.

Clerk to Court.

And for that the said John Evans after the sending of the said
letter to the said John Roberts as aforesaid, to wit, on the said
23rd day of October, in the year of our Lord one thousand eight
hundred and fifty-six, did under the colour or pretence that the
said letter was the process of the said County Court of Mont-
gomeryshire, holden at Welchpool, and that the same authorized
him to demand from Mary Roberts, the wife of the said John
Roberts, payment to him, the said John Evans, of certain money
which he, the said John Evans, then alleged to be due from the
said John Roberts as the court fees upon the said letter or appli-
cation, and did thereby and by other means act and profess to act
under colour or pretence of the process of the said County Court
of Montgomeryshire, holden at Welchpool. Whereas in truth
and in fact the said letter or application so sent to the said John
Roberts as aforesaid was not the process of the said County Court
of Montgomeryshire, holden at Welchpool, and was not issued by
the registrar of the said County Court, or by any other person

having authority to issue the process thereof, which the said John Evans then well knew. And whereas in truth and in fact the said John Evans had no authority to act or profess to act under any process of the said County Court of Montgomeryshire, holden at Welchpool, or to demand or to take from the said Mary Roberts payment of any sum or sums of money under colour or pretence of any process of the said County Court of Montgomeryshire, holden at Welchpool, which the said John Evans then well knew; against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

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It was proved on the trial that one John Roberts, who resided at Llanfair, within the district of the County Court of Montgomeryshire, holden at Welchpool, was indebted to the prisoner in the sum of ten shillings, and that the prisoner for the purpose of obtaining payment of such debt sent to the said John Roberts the letter set out in the indictment. The original letter is annexed to and is to form part of this case, and is marked (A.)

A genuine form of summons of the County Court of Montgomeryshire, holden at Welchpool, is also annexed to, and is to form part of this case, and is marked (B.) [This document bore no resemblance to the letter above mentioned.]

Some days after the said letter had been received, Mary Roberts, the wife of the said John Roberts, went to the prisoner at Llanfair and asked him if he had sent the letter, to which the prisoner replied that he had ordered the court to send it; and upon being so informed she paid the prisoner the 10s., the money demanded in the letter.

Whilst the 10s. was lying on the table, and whilst the prisoner was writing the receipt, the prisoner asked Mary Roberts for 1s. 3d. for the County Court expenses, as he wanted to put the full amount in the receipt. Mary Roberts said she had no more money. The prisoner then said he would take 6d., and that he had done the same with Mr. Evans of Hirrhos, who had paid him 1s. 3d. for County Court expenses. Mary Roberts still said she had not any more money; and no money was paid by Mary Roberts for costs, and a receipt for the 10s. alone was given. A copy of such receipt is annexed to, and is to form part of this case, and is marked (C.)

The jury convicted the prisoner, and I sentenced him to imprisonment with hard labour for two calendar months, but respited the execution of the sentence, admitting the prisoner to bail until the Midsummer Sessions, in order to obtain the opinion of the Court for Criminal Cases reserved upon the question, whether the facts as above stated constitute an offence within the meaning of the 57th section of the County Courts Act, 9 & 10 Vict. c. 95.

M'Intyre, for the prisoner.—The question is, whether the prisoner has committed any offence under sect. 57 of 9 & 10 Vict. c. 95, which enacts "that every person who shall forge the seal or any process of the court, or who shall serve or enforce any such forged process, knowing the same to be forged, or deliver or cause to be

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delivered to any person any paper falsely purporting to be a copy of any summons or other process of the said court, knowing the same to be false, or who shall act or profess to act under any false colour or pretence of the process of the said court shall be guilty of felony." Now it is submitted, that the prisoner did not act or profess to act under any false colour or pretence of the process of the County Court. He wrote a letter threatening proceedings if the money was not paid; and he made a representation that he had ordered the court to send that letter; but he did not state that that letter was a County Court process, and there was nothing upon the face of it to give it any appearance of such process. On the contrary, it purported not to be process; for both in form and substance it was totally different from any genuine process of the court.

LORD CAMPBELL, C. J.—It may be that the sending of the letter would not by itself be a pretending to act under colour of County Court process. But that is only one step in the commission of the offence; and when the prisoner went afterwards and stated that he was entitled to 1s. 3d. for County Court expenses, that certainly does seem to be an acting under pretence of process, and to be one of the cases contemplated by the statute.

WILLIAMS, J.—Suppose he had said that he was the high bailiff of the court and had a writ in his pocket?

M^cIntyre.—That would have been a very different case. The prisoner did not say that there was any order of the court for payment of the 1s. 3d.

BRAMWELL, B.—Is not this section of the statute directed against a different class of cases from this? It seems to me intended to prevent either the making of false process, purporting to be genuine, or the falsely pretending to act under genuine process.

ERLE, J.—I think it also includes the offence of putting forth as process that which is not process; a kind of offence very likely to impose upon the very poor and very ignorant, for whose protection this clause is intended.

BRAMWELL, B.—This section makes the offence felony, and the Legislature may well have intended to make a distinction between the offence of fabricating documents to imitate genuine process, and the making or using of documents which would bear no resemblance to process.

M^cIntyre.—That is the contention on the part of the prisoner. The prisoner may have been guilty of the misdemeanor of obtaining money by false pretences, and yet not be guilty of the felony created by this section; the language of which imports that there should be some counterfeiting of the genuine process; for the words are "colour or pretence of *the* process of the said court;" not "colour or pretence of process."

WILLIAMS, J.—What difference can it make whether the genuine process is imitated, if, for example, the person to whom it is shown cannot read.

M'Intyre.—Still it is a graver and more dangerous offence to imitate the genuine process. *Reg. v. Myott* (6 Cox Crim. Cas. 406) is an authority in the prisoner's favour. There the prisoner called at the house of a debtor, who had been duly served with a genuine County Court summons, after the day for his appearance had passed, and said that he was authorized by the court to receive the debt and costs, and that if the amount was not paid by a certain time he should bring an execution and take the goods. That was a much stronger case than the present; and yet Crompton, J., stopped the case for the prosecution and said, "that in his opinion the charge was not made out, as he thought the act of Parliament applied to false instruments, and not to mere false representations as to the authority or employment of the prisoner. There was no acting or professing to act under the process of the County Court."

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Welsby, for the prosecution.—This case falls within the words and also within the object of the section. The object is to protect the poor and ignorant from any such imposition and extortion as may be practised upon them by designing persons with respect to proceedings or supposed proceedings in the County Court; and it would defeat that object altogether, in the great majority of cases, if the court should hold that the section applies only to cases in which there has been an imitation of some genuine process, calculated to deceive a person acquainted with genuine process.

BRAMWELL, B.—But what is "the process" of the County Court, which you say the prisoner professed to act under.

Welsby.—He did not profess to act under any particular writ or warrant; but he gave the woman to understand that there was some process of the County Court which authorized his demand upon her.

Lord CAMPBELL, C. J.—Whereby County Court expenses had been incurred.

Welsby.—The case cited is not in point. There was no employment in that case of such a letter as the prisoner used in this. All the circumstances must be put together; and if that be done, it cannot be doubted that the prisoner by his statements and the document intended to make the woman believe, that he was acting under the authority and order of the court.

M'Intyre, in reply.—At the most his representations amounted only to this,—that at some future time process would be issued against her husband, and that he might be called upon to answer a judgment summons. He did not, however, in any way pretend, either by words or tokens, that he had at that time any judgment summons or warrant, or any process of any kind.

Lord CAMPBELL, C. J.—But for the opinion entertained by my brother Bramwell in this case, I certainly should have thought it a very clear case. The very object of this 57th section is to protect a class of persons, who being poor and illiterate are very liable to be imposed upon, against demands made upon them under the pretence or colour of County Court process. It provides against

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three distinct offences: first, the forgery of the seal or the process of the court, or the service of forged process, knowing it to be forged; secondly, the delivery of any paper falsely purporting to be a copy of any process; and lastly, the offence in question, which is described in very large and comprehensive words, including any person "who shall act or profess to act under any false colour or pretence of the process of the said court." Now these words are quite large enough to include the present case; and they will apply to every case where a person falsely pretends that he is acting under the process of the court. Perhaps if the prisoner had merely sent the letter that would not have been enough; but when he afterwards tells the woman that he had ordered the court to send it, it purporting to be signed by the clerk, and then demands a sum of money for County Court expenses, the whole taken together affords abundant evidence that he intended the woman to believe that he had process of the court authorizing his demand, and that he did falsely pretend to her that he had such process, and that under that process he was acting in receiving from her the 10s. and also in claiming the County Court expenses. I cannot, therefore, entertain any doubt that this case falls within the words of the section and also within the intention of the Legislature in passing it.

ERLE, J.—I also think that this conviction should be affirmed. The question is whether the prisoner acted or professed to act under the false colour or pretence of the process of the said court; and I am of opinion that he did. I bear in mind that these tribunals are intended for the benefit of the poor and illiterate classes, and that the object of the enactment is to protect from extortion by means of pretended process those who, having little knowledge of business and still less of law, are very much exposed to such imposition. The Legislature has sought to carry out that object by making it felony either to forge the seal or the process of the court or knowingly to serve forged process, or to deliver papers falsely purporting to be copy of the process of the court; and lastly, to act or profess to act under the false colour or pretence of the process. Now it appears to me that the prisoner clearly pretended to act under the process of the court; because in writing the letter he intended to represent, and wished to make the person to whom it was addressed believe, that it was issued under the authority of the court, and as the process of the court deriving its efficacy from the power of that tribunal. It is argued that nothing more is to be inferred from the prisoner's statements than that he meant that at some future time process might issue upon a judgment; but I do not think that that is the fair interpretation of what took place; and even if it were, that assumes that he falsely represented that a judgment had been obtained. Mr. M'Intyre also contends that no case falls within the section, unless the false instrument purported on the face of it to be and bore resemblance to the genuine process of the court. It is certain, if that were so, that the section would be very nearly inoperative; for the class of

persons by whom the very ignorant are generally defrauded consists of those who, though more artful, are not much less ignorant than themselves, and who would, for the most part, use such imperfect devices as would not deceive anyone at all acquainted with genuine process. Taking this view of the statute, it seems to me that there was in this case indisputable evidence of a professing to act under the false colour or pretence of process.

WILLIAMS, J.—I am of the same opinion. The only argument of any weight in the prisoner's favour is that this section contemplates only cases in which there is some counterfeiting of, or pretending to act under some genuine process of the court; but I find nothing in the words to warrant that construction; and I do not see why its operation should be so limited and its application to numerous cases be thereby prevented. I have already put the case of a man falsely pretending that he was high bailiff of a court, and that he had a writ in his pocket; can it be doubted that the framers of the section meant to reach such a case? The words are quite large enough to include it; and in my judgment the statute applies whenever anyone falsely pretends to have process under which he professes to act. In this case, looking at all the facts stated, the prisoner seems to me to have done so; and he was therefore, in my opinion, properly convicted.

CROWDER, J.—I also am of opinion that the construction which we are asked to put upon this section is too narrow; and that the Legislature intended to include within its operation not only the cases where there has been genuine process, or some imitation of genuine process, under colour of which the party charged has professed to act, but also those where, although no genuine process or imitation of it has been used, a person has been induced to part with his money by reference being made to something, either verbal or written, for the purpose of inducing a belief that the money is demanded by virtue of some process of the County Court. It is impossible to doubt that the wife in this case did so believe; and there is as little doubt of the intention of the prisoner, who, according to his own statement, had obtained money from another person by the same means.

BRAMWELL, B.—Being in a solitary minority, I cannot doubt that my opinion on this case is wrong; and certainly if the court has put the right interpretation upon the words of the section, this case falls within it. But my own opinion is, that this case does not come within the words or the intention of the Legislature. I confess that to my mind this sort of penal legislation is better avoided, and that the fewer statutory crimes we have the better; but in the construction of a clause of this sort I certainly should have supposed that the offence consisted in fabricating something which was calculated to deceive a person possessed of a reasonable acquaintance with the subject-matter; and that I believe to be the correct principle, whether it be old or new. Until, therefore, I had heard the judgment in this case I was strongly of opinion that the section was framed to punish the forgery of documents purporting

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to be the process of the court, or the false assumption of such authority as genuine process would give. The offence created by the statute is acting, or professing to act, under the false colour or pretence of the process of the said court; but the proof in this case is only, at most, of a pretence of process, not of "the process" of the court, which must mean some genuine process. If this were the correct construction, it would not follow that such frauds as the present would go unpunished; because, whenever money was obtained, the parties would be indictable for obtaining it by false pretences; but upon the words of this section I think the offence consists in pretending that there is some process which would authorize the act done, and that the party charged was at the time acting under it. Here, however, it does not appear that the prisoner ever pretended that there was any process under which he could have demanded the 1s. 3d.; for the letter was the only thing referred to, and that certainly was not process.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

June 18, 1857.

(Before LORD CAMPBELL, C.J., ERLE, WILLIAMS, and
CROWDER, JJ., and BRAMWELL, B.)

REG. v. DAVID HUGHES. (a)

Manslaughter—Neglect of duty—Act of omission.

Upon an indictment for manslaughter, it appeared that the death was occasioned by the falling of a truck full of bricks into the shaft of a mine, when the deceased was at work ; and that the truck fell in, in consequence of the prisoner's neglect of duty in omitting to place a stage over the mouth of the shaft. The prisoner having been convicted : Held, that the conviction was right ; as the crime of manslaughter no less than that of murder might be committed by acts of omission as well as of commission.

THE following case was reserved by Watson, B. :—

This prisoner was tried before me at the last Swansea Assizes, on February 25th, 1857, on an indictment for manslaughter.

It was proved that some contractors were employed to wall the inside of a new shaft which was sinking in a colliery, called the Tylecock Colliery. The deceased with others were working at the wall on a stage in the shaft. The prisoner was banksman at the top of the shaft, where there was an engine and rope to send down bricks and materials in a bucket and draw up the empty bucket. It was his duty to send down materials and to superintend the proper letting down the buckets and to place the stage herein-after mentioned. The buckets were run on a truck on to a moveable stage over half the area of the top of the shaft, and then the bucket was attached and lowered down, the stage being withdrawn.

The prisoner on the occasion in question had omitted to put, or to cause to be put, the stage on the mouth of the shaft. In the absence of the stage, a bucket with a truck and bricks ran along the tramroad into the shaft and fell down the pit and killed the deceased. It did not appear that the prisoner was directing or driving the waggon at the time.

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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I left it to the jury whether the accident happened by negligence of the prisoner, and whether that negligence arose from an act of omission or commission. They found that the death of deceased arose from negligent omission on the part of the prisoner in not putting the stage on the mouth of the shaft. Thereupon I directed a verdict of guilty. I did not pass sentence. I released the prisoner on bail until the opinion of the Criminal Court of Appeal should be taken.

This case was not argued by counsel, but it was considered by the judges above named.

LORD CAMPBELL, C.J., now delivered the judgment of the court.—We are of opinion that this conviction ought to be affirmed. It was the duty of the prisoner to place the stage on the mouth of the shaft; the death of the deceased was the direct consequence of the omission of the prisoner to perform this duty. If the prisoner, of malice aforethought and with the premeditated design of causing the death of the deceased, had omitted to place the stage on the mouth of the shaft, and the death of the deceased had thereby been caused, the prisoner would have been guilty of murder. According to the common law form of an indictment for murder, by reason of the omission of a duty, it was necessary that the indictment should allege that it was the duty of the prisoner to do the act, or to state facts from which the law would infer this duty: (*R. v. Edwards*, 8 Car. & P. 611; *R. v. Sarah Goodwin*, 1 Russ. on Crimes, 563n, 3rd edit.) But it has never been doubted that if death is the direct consequence of the malicious omission of the performance of a duty (as of a mother to nourish her infant child) this is a case of murder. If the omission was not malicious and arose from negligence only, it is a case of manslaughter. It has been held that to make the captain of a vessel guilty of manslaughter in causing a person to be drowned by running down a boat, proof of a mere omission on his part to do the whole of his duty is not sufficient: (*R. v. Allen*, 7 Car. & P. 153.) But there is no authority for the position that without an act of commission there can be no manslaughter; and on the contrary, the general doctrine seems well established that what constitutes murder being by design and of malice prepense, constitutes manslaughter when arising from culpable negligence.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

June 18, 1857.(Before LORD CAMPBELL, C.J., ERLE, WILLIAMS, and
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REG. v. DANGER. (a)

*False pretences—Obtaining valuable security—Inducing prosecutor by fraud to accept a bill of exchange.**A. falsely represented to B. that a third person was baling up for him a quantity of leather which was to come into his warehouse that afternoon, and requested B. to purchase it at a price which he named. B. agreed to become a purchaser at that price, and thereupon A. asked B. to accept a bill for the amount of the purchase money. B. consented; and A. shortly afterwards produced a bill of exchange duly stamped, signed by himself as drawer, payable to his own order, and addressed to B. This bill A. handed to B. who accepted it and returned it to A., by whom it was indorsed and discounted.**Held, that A. could not be convicted of obtaining from B. a valuable security by false pretences, as the instrument whilst in B.'s hands was of no value to him or to any one else, unless to the prisoner; and as B. had no property either in the instrument or the paper on which it was written.*

THE following case was reserved by the Recorder of Bristol:—
The prisoner, John Danger, was tried before me at the Quarter Sessions of the Peace, in and for the city and county of Bristol, held on the 7th day of April, in the year of our Lord 1857, on an indictment under the statute 7 & 8 Geo. 4, c. 29, s. 53, for obtaining a valuable security by false pretences. The indictment contained two counts, a copy of which is annexed to this case.

The false pretences were proved, as alleged in the indictment. It was also proved that Richard Latham, the prosecutor, relying on such pretences, agreed to become the purchaser of a quantity of leather, called butts, of and from the prisoner John Danger, at the price of 184*l.* 16*s.* That the prisoner then asked Richard Latham to accept a bill of exchange for the amount of the purchase-money; that Richard Latham agreed to do so; that soon afterwards the prisoner produced a bill of exchange, duly stamped, signed by himself as drawer, under the name of John

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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Danger and Company, payable to the drawer's own order, and addressed to Richard Latham for 184*l*. 16*s*. four months after date, and handed the same to Richard Latham. That Richard Latham accepted the bill by writing his name across it, and made it payable at Messrs. Stuckey's bank, Bristol, and then delivered the same so accepted to the prisoner; that the prisoner took possession of the bill, and afterwards indorsed and discounted the same, and applied the proceeds to his own use. At the close of the case for the prosecution, it was objected by the prisoner's counsel, that there was no evidence that the prisoner had obtained from Richard Latham a valuable security, within the meaning of the statute 7 & 8 Geo. 4, c. 29, s. 53, so as to sustain either count of the indictment, on the ground that the evidence showed that the prisoner had obtained from Richard Latham, either an acceptance only, or an instrument which was not an available security or of any value to Richard Latham. I refused on this objection to direct an acquittal, but left the case to the jury, who found the prisoner guilty; but I reserved the question for the opinion of the Court of Criminal Appeal, whether there was evidence that the prisoner obtained from Richard Latham a valuable security, so as to sustain either count of the indictment. After the verdict it was objected, in arrest of judgment, that each count of the indictment was bad, for not alleging that the valuable security obtained by John Danger was the property of Richard Latham, and the case of *Still v. The Queen* (1 Ell. & B. 553), was cited. I also reserved that question, and I have to request the opinion of the Court of Criminal Appeal upon the above matters. I postponed the sentence, and admitted the prisoner to bail until the next Quarter Sessions for the said city and county of Bristol.

The indictment was as follows:—

City and county of Bristol, } The jurors for our Sovereign Lady
to wit. } the Queen upon their oaths
present, that before and at the time of the committing of the
offence hereinafter named, one Richard Latham was a currier
carrying on business at Redcliff Street, in the parish of St. Mary
Redcliff, in the city and county of Bristol, and one George Jen-
kins was a tanner carrying on business at that part of the parish
of Bedminster which is within the city and county of Bristol,
and that John Danger, late of the parish of St. Nicholas, in the
city and county aforesaid, leather factor, on the 27th day of
December, in the year of our Lord one thousand eight hundred
and fifty-six, being an evil disposed person, and contriving and
intending unlawfully, fraudulently, knowingly, and designedly to
cheat and defraud, then and there to wit, on the day and year
aforesaid, at the parish last aforesaid, did ask the said Richard
Latham if he, the said Richard Latham, would buy some of
George Jenkins (meaning the said George Jenkins) butts;
whereupon the said Richard Latham then and there told the said
John Danger, that he, the said Richard Latham, had been
speaking to Mr. Jenkins (meaning the said George Jenkins), and

he (meaning the said George Jenkins), said he had no butts to sell, and the said John Danger thereupon, unlawfully, knowingly, and designedly, did falsely pretend and say to the said Richard Latham, you (meaning the said Richard Latham) don't know George Jenkins (meaning the said George Jenkins) as well as I do, for he (meaning the said George Jenkins) is now baling up three hundred butts for me (meaning himself the said John Danger) to come into my warehouse (meaning the warehouse of the said John Danger) this afternoon; and that he, the said Richard Latham, should have them at the price of twenty-one pence per pound, and that the said Richard Latham then and there agreed to become the purchaser of, to wit, a certain part of the said butts of and from the said John Danger at that price, whereupon the said John Danger asked the said Richard Latham to accept a bill for 184*l.* 16*s.*, and then and there produced a bill of exchange drawn by him the said John Danger, upon him the said Richard Latham, for the said sum of 184*l.* 16*s.*, and the said John Danger then and there stated to the said Richard Latham, that he, the said Richard Latham, should have the worth of it (meaning the bill of exchange for 184*l.* 16*s.*) in these butts, meaning the said butts which the said John Danger had as aforesaid, unlawfully, knowingly, and designedly, falsely pretended and said that the said George Jenkins was baling up for him the said John Danger, and which said butts were to come into his the said John Danger's warehouse that afternoon) by which said false pretence he the said John Danger, on the day and year aforesaid, at the parish of St. Nicholas, in the city and county aforesaid, did unlawfully obtain from the said Richard Latham a certain valuable security, to wit, the said bill of exchange, which the said John Danger had so drawn upon the said Richard Latham as aforesaid, and which the said Richard Latham then and there accepted for the said sum of 184*l.* 16*s.*, with intent to cheat and defraud. Whereas, in truth and in fact, the said George Jenkins was not on the said 27th day of December, in the year of our Lord one thousand eight hundred and fifty-six, in the possession of three hundred butts, or any butts of the property of the said John Danger, nor was the said George Jenkins on the said 27th day of December, one thousand eight hundred and fifty-six, baling up three hundred butts for the said John Danger; against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Second count. — And the jurors aforesaid, upon their oath aforesaid, do further present that the said John Danger, on the day and year aforesaid, in the parish of St. Nicholas, in the city and county aforesaid, unlawfully, knowingly, and designedly, did falsely pretend to the said Richard Latham that one George Jenkins had sold to and was then baling up for him, the said John Danger, three hundred butts of leather, and which the said John Danger then and there unlawfully, knowingly, and designedly, falsely pretended and stated to the said Richard Latham were to

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come into his, the said John Danger's, warehouse, on the afternoon of the said day, and that the said John Danger could and would then sell the same, or any part thereof, to the said Richard Latham at a certain price, to wit, the price of twenty-one pence a pound. By means of which said false pretences the said John Danger did then and there unlawfully obtain from the said Richard Latham a certain valuable security, to wit, a bill of exchange for the sum of 184*l.* 16*s.* of and from the said Richard Latham, as and for the sum to be paid by him in payment for certain of the said three hundred butts aforesaid, with intent then and there to cheat and defraud the said Richard Latham of the same. Whereas, in truth and in fact, the said George Jenkins had not sold to the said John Danger, nor was the said George Jenkins then baling up for him, the said John Danger, three hundred butts of leather, or any butts of leather whatsoever, nor were the said three hundred butts of leather to come into his, the said John Danger's, warehouse, on the afternoon of the said day, nor could the said John Danger then sell the same, or any part thereof, to the said Richard Latham; against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Prideaux, for the prisoner.—The indictment is bad in form for not alleging the valuable security to have been the property of the prosecutor, according to the cases of *Sill v. The Queen* (1 Ell. & Bl. 553); *Reg. v. Parker* (3 Q. B. 292); and *R. v. Martin* (8 Ad. & Ell. 481); and the conviction cannot be sustained. Even if the indictment were correct in form, and alleged the bill to have been the property of the prosecutor, the conviction would still have been wrong, because upon the facts proved it appears, first, that the bill never was the property of or in the possession of the prosecutor; and secondly, that it was not a valuable security within the statute 7 & 8 Geo. 4, c. 29, s. 53. The paper upon which it was written was the property of the prisoner; and it was handed to the prosecutor merely for the purpose of his writing his acceptance thereon. When that was done the property and the right of possession were in the drawer, and any detention of it by the acceptor would have been wrongful. *Smith v. McClure* (5 East, 476), where Lord Ellenborough said, that if after acceptance the acceptor improperly detained the bill in his hands, the drawer might, nevertheless, sue him on it, and give him notice to produce the bill. So in *Johnson v. Windle* (3 Bing. N. C. 225), which was trover for a promissory note that had been stolen, the note being payable to the plaintiffs or order, Bosanquet, J., said, "This instrument on the face of it was marked as the property of the plaintiffs." In like manner the bill of exchange in the present case was on the face of it marked as the property of the prisoner: (*Morrison v. Buchanan*, 6 Car. & P. 18.) In *Evans v. Kymer* (1 B. & Ad. 528), the property in a bill was held to be in the acceptor, but that was because it had been deposited with the drawer to hold for the acceptor's use. In this case, however, not only was the bill never the property of the prosecutor, but it was

also never in his possession. *R. v. Smith* (2 Den. C. C. 449; 5 Cox Crim. Cas. 533) is expressly in point. There the prisoner, professing to settle a debt on behalf of a third person with the prosecutor, took out of his pocket a piece of blank paper stamped with a sixpenny stamp and put it upon the table, and then took out some silver in his hand and mentioned the amount for which the prosecutor was to give a receipt. After the prosecutor had written and signed a receipt for that sum on the stamped paper, the prisoner took it up and went out of the room. On being asked for the money he said, "it's all right," but never paid it. The court held, that the prosecutor never had any such possession of the stamped paper as would entitle him to maintain trespass; and that, consequently, the prisoner could not be convicted of stealing it. The cases there cited are also in point. *R. v. Minter Hart* (6 Car. & P. 106) was a case in which the prosecutor was, by fraud, induced to write acceptances upon blank stamps produced by the prisoner, which were afterwards filled up by him and put into circulation; and the judges there decided that the stamps so filled up were not bills of exchange, orders for the payment of money, or securities for money; and that as the prosecutor never had any possession of the papers, so as to enable him to maintain trespass, there was no taking of them to constitute larceny. In *R. v. Phipoe* (2 Leach, 673), the prosecutor was compelled by duress to sign a promissory note, previously prepared by the defendant and withdrawn by him as soon as signed; and a majority of the judges thought that the case was not within the statute 2 Geo. 2, c. 25, s. 3, because the instrument was of no value to the prosecutor, who had not even a property in or possession of the paper on which it was written. That case, therefore, is an authority also for the second ground of objection to this conviction, that the instrument was not a valuable security. It is not enough that upon the face of it, it should appear to be so; the instrument must be effectual as a security when obtained, in order to come within the statute, *R. v. Pooley* (Russ. & Ry. 12); *R. v. Clark* (R. & R. 181); *R. v. Perry* (1 Den. C. C. 69; 1 Cox Crim. Cas. 222); and this instrument was altogether void when obtained. It was vitiated by the fraud practised in obtaining it; so that to the prisoner it was not valuable, and clearly it was valueless to any one else. Whilst it was in the hands of the prisoner it was not an available acceptance; no person could sue upon it until it had been indorsed to a real holder for value, and therefore prior to the indorsement it was no security: (*Cox v. Troy*, 5 B. & Ald. 474; *Downes v. Richardson*, ib. 674; *Stoessiger v. South Eastern Railway Company*, 3 Ell. & Bl. 549.) In truth, the defendant obtained from the prosecutor nothing but a promise to pay, or the evidence of a promise to pay, which might, except for the statutes on the subject, be merely verbal.

H. T. Cole, for the prosecution.—First, the prosecutor had a property in the bill and a possession of it at the time when he accepted it, sufficient to have entitled him to maintain trespass, or

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to have indicted any one for stealing it. After signing it, he might have destroyed it, if he altered his mind, instead of delivering it to the prisoner; or if he had delivered it to the prisoner to hold for him, he might afterwards have maintained trover for it: (*Evans v. Kymer.*) *R. v. Smith* was not the case of a valuable security, but of a receipt; and by section 5 of 7 & 8 Geo. 4, c. 29, a very extensive interpretation is put upon the words "valuable security" wherever used in that act; and amongst the documents declared to be included in that term are, "any bill, note, warrant, order, or other security for money, or for the payment of money." In *Reg. v. Greenhalgh* (1 Dears. C. C. 267; 6 Cox Crim. Cas. 257) an order by the president of a burial society upon the treasurer for payment of money to bearer, was held a "valuable security" within section 53, as explained by section 5 of the statute. This case is an answer to the argument that the security obtained must be valuable to the prosecutor; for the order was of no value to the person from whom it was obtained. In *R. v. Boulton* (1 Den. C. C. 508; 3 Cox Crim. Cas. 576), it was held that a railway ticket, entitling a passenger to travel from one place to another, was a chattel of value; but, of course, it was of value only to the person obtaining it, and not to the person from whom it was obtained. It is quite enough, therefore, if the acceptance was valuable to the prisoner; and there can be no doubt that it was. It was complete as an acceptance when the prosecutor had written his name upon it, because that was done in the prisoner's presence; and in Byles on Bills (p. 143, 5th edit.), the law as to what constitutes a complete acceptance is thus expressed:—"The liability of the acceptor, though irrevocable when complete, does not attach by merely writing his name, but upon the subsequent delivery of the bill, or *upon communication to some person interested in the bill that it has been so accepted.*" Here there was notice; and the best evidence of its value is, that by indorsing it away the prisoner was able to obtain the money.

Prideaux, in reply.—In *R. v. Greenhalgh*, the order was payable to bearer, and that therefore was a valuable security in the hands of other persons than the prisoner. It was not like the present case, where the instrument was utterly valueless to any one but the prisoner at the time when it was obtained. It is true that it might become valuable to others after it had been indorsed; but that is not enough. It must be a valuable security when obtained.

Cur. adv. vult.

JUDGMENT.

Lord CAMPBELL, C.J., now delivered the judgment of the court.—We are of opinion that the offence charged and proved in this case does not come within the 7 & 8 Geo. 4, c. 29, s. 53. "The chattel, money, or valuable security," the obtaining of which by a false pretence may be made the subject of an indictment within this statute, must, we conceive, have been the property of some one other than the prisoner. Here there is great difficulty

in saying that as against the prisoner the prosecutor had any property in the document as a security, or even in the paper on which the acceptance was written. In no one else could the property be laid. We should not have given weight to the argument, that even in the prisoner's hands it was not a valuable security by reason of the fraud which would prevent him from enforcing it; but we apprehend that to support the indictment the document must have been a valuable security while in the hands of the prosecutor. While it was in the hands of the prosecutor it was of no value to him nor to any one else, unless to the prisoner. In obtaining it the prisoner was guilty of a gross fraud, but we think not of a fraud contemplated by this act of Parliament.

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Judgment reversed.

COURT OF CRIMINAL APPEAL.

January 24, 1857.(Before POLLOCK, C.B., CRESSWELL and WIGHTMAN, JJ.,
and MARTIN and WATSON, BB.)

REG. v. JOSEPH WILSON. (a)

*Larceny — Evidence — Recent possession — Necessity of disproving prisoner's statement, when he mentions the persons from whom he received the stolen goods.**As a matter of law it is not incumbent upon the prosecution, on a trial for larceny, to call as witnesses the persons whom the prisoner has named as able to account for his possession of the stolen property, though the persons so named are known and might be called.***T**HIS case was stated by the deputy chairman of the West Riding Quarter Sessions.

Joseph Wilson was tried before me at the West Riding Intermediate Sessions held at Sheffield, on the 2nd December, 1856, on an indictment charging him with stealing, and also with receiving, articles of dress knowing them to have been stolen. The prosecutor, Thomas Wilson, proved that his house was broken open on Sunday, the 2nd of November, and the articles in question, two waistcoats and two pairs of trousers, taken from it. A witness named William Scarmell, proved that he bought them from the prisoner for 12s. in a public-house in Sheffield, on Tuesday night the 4th of November; about thirty persons were in the room at the time, and the prisoner sold the articles openly without any attempt at concealment. Scarmell's wife proved that she pawned them on the 5th, when they were stopped by the pawnbroker as stolen goods, and through the information of the Scarmells the prisoner was taken into custody. To the constable who charged him with the felony, the prisoner said, "Cocking and Derby brought them to my house, and the woman who keeps my house (Mrs. Wilson) will say so: and I, being on the spree, sold them and spent the money." In consequence of this statement Cocking and Derby were apprehended. And Cocking was committed for

trial and convicted of stealing articles taken at the same time from the prosecutor's house. Derby was taken before the magistrates, but discharged by them for want of evidence against him. The constable went to Mrs. Wilson's house and made inquiries as to the prisoner's statement. No evidence of what transpired on such inquiries was received. No question was raised in the case as to the identity of the stolen articles. This was the case for the prosecution. Counsel for the prisoner submitted that there was no case to go to the jury, and contended that as the prisoner had stated how he came into possession of the stolen property, and had mentioned the names of the persons from whom he had received it, those persons being real persons and known to the constables, it was incumbent on the prosecution to negative his statement, if false, by calling Cocking or Derby, or Mrs. Wilson, and that it was not in accordance with the rules of evidence, which excludes hearsay, for the constable to come and swear what those persons told him, or the result of inquiries made to them. The cases of the *R. v. Crowhurst* (1 Car. & Kir. 370), and *R. v. Smith* (2 Ibid. 207); and 2 East, P. C. 665, were referred to. I overruled the objection, and told the jury that the constable having made inquiries which had satisfied him, it was not necessary for the prosecution to call Cocking or Derby, or Mrs. Wilson, at the trial. It might have been more satisfactory if they had been called, but it was in the prisoner's power, if he required their testimony, to have called them; and it was for the jury to say if they thought the evidence as it stood sufficient. The prisoner was convicted of stealing, and sentenced to three calendar months' imprisonment; but the execution of this sentence was respited, and the prisoner liberated on bail to await the decision of the Court of Criminal Appeal on the following question:—Whether under the circumstances of the case, which rested solely on a recent possession of the stolen goods, it lay on the prosecution to call the persons to whom the prisoner referred to account for his possession, or some of them, as witnesses at the trial; and whether the prosecution not having called those witnesses, the conviction ought not to be quashed?

No counsel appeared for the prisoner.

A. J. Johnston appeared for the prosecution, but was not heard.

POLLOCK, C. B.—We need not hear you. The conviction must be affirmed; for there certainly was some evidence for the jury upon which they might convict the prisoner; at the same time I must say I should have been sorry to have had a prisoner convicted before me upon such evidence.

WIGHTMAN, J., concurred.

CRESSWELL, J.—I agree that the conviction must be affirmed without expressing any opinion as to its propriety. It is possible that if I had been present at the trial and heard the case throughout, I might have thought it a very proper conviction.

MARTIN and WATSON, BB., concurred.

Conviction affirmed.

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COURT OF CRIMINAL APPEAL.

May 11, 1857.

(Before all the Judges, except WIGHTMAN and WILLIAMS, JJ.,
and MARTIN, B.)

REG. v. BRYAN. (a)

7 & 8 Geo. 4, c. 29, s. 53—*False pretences—Pledging goods—
Misrepresentation of quality—Puffing.*

A simple misrepresentation of the quality of goods is not a false pretence within the statute 7 & 8 Geo. 4, c. 29, s. 53, provided the goods are in specie that which they are represented to be.

In order to obtain an advance of money on a large quantity of plated spoons, the defendant represented to a pawnbroker that they were of the best quality, that they were equal to Elkington's A. (meaning spoons and forks made by Elkington, and stamped by him with the letter A), that the foundation was of the best material, and that they had as much silver upon them as Elkington's A. The jury found that these representations were wilfully false, and that by means of them an advance of money was made: Held, dissentientibus Willes and Bramwell, that the conviction was wrong, and that the representation being a mere exaggeration or puffing of the quality of the goods in the course of a bargain, it was not a false pretence within the statute.

THE following case was reserved by the recorder of London at the Central Criminal Court :—

It was partly argued before five of the learned judges on a former day, but on account of the importance of the question raised in this as well as in *Reg. v. Sherwood* (*ante*, p. 270), they were both ordered to be reargued before all the judges.

CASE.

At the session of gaol delivery holden for the jurisdiction of the Central Criminal Court on the 2nd day of February, 1857, John Bryan was tried before me for obtaining money by false pretences. There were several false pretences charged in the different counts of the indictment, to which, as he was not found guilty of them by

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

the jury, it is not necessary to refer. But the following pretences were among others charged:—

That certain spoons produced by the prisoner were of the best quality, that they were equal to Elkington's A (meaning spoons and forks made by Messrs. Elkington, and stamped by them with the letter A) that the foundation was of the best material, and that they had as much silver upon them as Elkington's A. The prosecutors were pawnbrokers, and the false pretences were made use of by the prisoner for the purpose of procuring advances of money on the spoons in question offered by the prisoner by way of pledge, and he thereby obtained the moneys mentioned in the indictment by way of such advances. The goods were of inferior quality to that represented by the prisoner, and the prosecutors said that had they known the real quality, they would not have advanced money upon the goods at any price. They moreover admitted that it was the declaration of the prisoner as to the quality of the goods and nothing else which induced them to make the said advances. The money advanced exceeded the value of the spoons. The jury found the prisoner guilty of fraudulently representing that the goods had as much silver on them as Elkington's A, and that the foundations were of the best material, knowing that to be untrue, and that in consequence of that he obtained the moneys mentioned in the indictment. The prisoner's counsel claimed to have the verdict entered as a verdict of "not guilty," which was resisted by the counsel for the prosecution, and entertaining doubts upon the question, I directed a verdict of guilty to be entered, in order that the judgment of the Court of Criminal Appeal might be taken in the matter, and the foregoing is the case on which that judgment is requested.

RUSSELL GURNEY.

B. C. Robinson, for the prisoner, submitted that these were not false pretences within the statute. That the rule to be deduced from all the cases was this, that where the thing obtained was in specie that which it was represented to be, the statute applied; but where the falsehood was merely as to the quality of the thing, where it became a mere question of better or worse, such pretence was not indictable. Here the goods were in specie what they were represented to be; they were plated goods, but they were inferior in quality to the representation. If it were otherwise, and that the puffing or vaunting an article that was offered for sale was a criminal offence, every trader in the commercial world would be committing a crime twenty times in the course of each day. In *R. v. Roebuck* (7 Cox Crim. Cas. 126), most of the learned judges in delivering their judgment stated that but for the case of *R. v. Abbott* (1 Den. C. C. 173), they should have hesitated in holding the conviction to be proper, but that they felt bound by that authority. If then it could be shown that the present case, if the conviction were to be sustained, would go further than those above mentioned, the court would not confirm it. Every decision might be reconciled with the principle contended for. In *R. v. Roebuck*,

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the chain pawned for silver was not silver at all. So with regard to the thimble in *R. v. Ball*: (C. & M. 249.) In *R. v. Dundas* (6 Cox Crim. Cas. 380), the article sold was stated to be Everett's blacking; it was bought on the faith of its being so, and it turned out to be a spurious compound. There it was not a mere representation of quality, but of a specific thing known as Everett's blacking.

Lord CAMPBELL.—Was not *R. v. Abbott* decided on a pretence with regard to the quality of a cheese?

Robinson.—No. If the representation alleged in the indictment had been that the cheese was of the same quality as the taster, that would have rendered the case analogous to this. But it was not so. The representation there was that the taster formed part and parcel of the cheese to be sold, and it was in truth of a totally different character, inserted into the bulk for the purposes of fraud. That was a statement of a specific fact quite independent of the quality. The cheese might have been of even better quality than the taster, and yet the falsehood of the pretence would equally exist. If the misrepresentation here had been that the spoons were of Elkington's manufacture, and had formed part of Elkington's stock, then the case would be identical with *R. v. Abbott*; but there is a wide distinction between the statements that they are Elkington's and that they are as good as Elkington's.

COLERIDGE, J.—If the seller is to be indictable for overpraising his goods, then the buyer would be indictable also for unfairly depreciating them, and thus obtaining them below their value.

Lord CAMPBELL.—That would certainly seem to be so. Even the act of depreciating would be indictable, because it would be an attempt to obtain them by a false pretence as to their quality.

Robinson.—In the administration of the criminal law, it is of the highest importance to define as accurately as may be what crime is, and not to leave too much to the interpretation of juries. Otherwise, in such a case as this, every man who was dissatisfied with a bargain he had made would have it in his power to indict a tradesman who sold him goods, on the plea that every representation made in the course of the bargain was not true to the letter. A cutler who warranted a knife to be as good as Rodger's; a tailor who stated a coat to be of the best Saxony wool; a brewer who represented his beer to be treble X, would be constantly amenable to the criminal law, and a jury would have to decide upon their fate. A line must be drawn somewhere, and to hold that a pretence to be within the statute must be with reference to some clear specific fact, the truth or falsehood of which may be demonstrably shown, the assertion and the fact being each the contradictory of the other, is consistent both with convenience and authority, whilst it would be highly dangerous to hold that statements which might be mere matters of opinion or speculation were the subject-matters of a criminal charge.

Lord CAMPBELL.—You say it is lawful to lie in respect of quality.

Robinson.—However immoral, that it is not a crime. At the

outset it must be admitted that this was a wilful lie. The case states it, and the jury have so found it. It must also be admitted that in consequence of the lie the money was obtained. It is only on such admissions that the point can ever arise. The question is, is such a lie as this a false pretence within the statute?

Lord CAMPBELL.—But it is part of the allegation that there is as much silver in the spoons as in Elkington's A. Is not that the assertion of a fact?

Robinson.—It is no more in reality than a representation of the quality. It is the amount of silver in these goods that gives them their value, and saying of them that they have more or less silver is equivalent to saying that they are of better or worse quality.

POLLOCK, C. B.—Suppose a seller of cheese to state that it came from a particular dairy in Cheshire, when in fact it came from America.

Robinson.—That might probably be a false pretence, because the buyer would not get the precise thing he bargained for. He might want a Cheshire cheese and not an American one, quite irrespective of the quality.

BRAMWELL, B.—I see nothing in the statute that recognizes a distinction between species and quality.

Robinson.—The statute must be taken in connection with the many cases that have been decided upon it, and which have given it a particular interpretation.

BRAMWELL, B.—If I buy a spurious autograph of the Duke of Wellington, or a spurious picture attributed to Raphael, I get a thing of the same species as that bargained for.

Robinson.—If the autograph or the picture was represented to be genuine when it was known to be spurious, that would probably be a false pretence; but if it was said that the writing or the painting was in the duke's or the painter's best style, and it was known to be otherwise, it would not be so. There are cases which tend to show that the doctrine of *caveat emptor* might be applicable here, or that false representations as to specific facts in the course of a bargain and sale are not within the statute, but still much doubt has of late been thrown upon them, and it is not thought necessary to rely upon them here.

Francis (with him Metcalfe) for the prosecution.—The false pretences relied upon are as to the quantity of silver in the spoons being equal to Elkington's A, and the foundations being of the best material. These are facts easily ascertainable, and which, in truth, the jury have expressed their judgment upon. They are not mere statements that the spoons are as good or as valuable as Elkington's. It is something more than a mere representation with regard to quality; for it must be taken, after the finding of the jury, that the amount of silver on Elkington's A spoons was a well known fixed quantity. In the case of *R. v. Sherwood*, just decided, it was held, that a misrepresentation with regard to quantity was a good false pretence within the statute, and there is here just as strong a representation as to quantity as there was

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there. The spoons, no doubt, had a small quantity of silver upon them, but it was so trifling that the money advanced exceeded their full value, and it is found that had the prosecutors known the real value they would not have advanced any money upon them whatever. But there is no case laying down the principle contended for on the other side, that a misrepresentation with regard to quality is not within the statute; on the contrary, in *R. v. Kenrick* (5 Q. B. 49), one of the pretences was, that a horse was quiet to ride and drive, which was false within the seller's knowledge, and the court sustained the conviction. The words of the statute are clear and precise, that goods obtained by any false pretence constitutes the crime; and the jury have here found everything that the act renders material. It was probably intended to prevent precisely such frauds as these; and the argument that this is a mere vaunting or puffing off of goods that a tradesman is anxious to sell is answered by this, that the jury have found that the representations were made fraudulently and with intent to cheat the prosecutor. Where there is such an intent, and it is acted upon successfully, there can be no inconvenience in holding it to be punishable as a crime; and a jury of tradesmen would not be likely to convict a man who had merely exaggerated the value of his property for the purpose of getting a better price for it. That is often done innocently, or at least without any fraudulent intent; but here such limits are far overstepped. *R. v. Roebuck* virtually decides this case, for the pretences are substantially the same. It is true that there the chain which was represented to be silver was not silver at all; but here the representation is equally false, for although the spoons were coated with silver, it was in so small a quantity as to render them almost valueless. So in *R. v. Abbott*, whatever might be the pretence alleged in the indictment, in substance the fraud consisted in selling a very inferior article for one of superior quality.

Robinson, in reply. — Whatever the representations may be, they have reference to quality and not to species; and this, at all events, distinguishes the case from *R. v. Roebuck*, and all the other cases that have been decided upon this point. As to *R. v. Kenrick* the decision did not turn upon the pretence mentioned, namely, that the horses were quiet to ride and drive. There were other pretences in that case that would be clearly within the rule that the pretences had been made with respect to specific facts, and it was upon these that the court acted. In *R. v. Sherwood* there was a pretence that there were eighteen tons of coal to be delivered, when in truth there were only fourteen. There was therefore an assertion that there were four tons of coal in the waggon which did not exist at all. Here the number of spoons delivered was correctly represented, but each individual spoon was of an inferior description. In fact, the case states that it was the declaration of the prisoner with regard to the quality of the goods, and nothing else, which induced the prosecutors to part with their money.

On the conclusion of the argument, the learned judges retired to consider the case, and on their return they delivered the following judgments *seriatim*.

LORD CAMPBELL, C.J.—I am of opinion that this conviction cannot be supported, as it seems to me to proceed upon a mere representation, during the bargaining for the purchase of a commodity, of the quality of that commodity. In the last case which we disposed of (*R. v. Sherwood*), after the purchase had been completed there was a distinct averment which was known to be false, respecting the quantity of the goods delivered, and in respect of that misrepresentation a larger sum of money was received than ought to have been received, the amount of which could be easily calculated; and therefore I thought, and I think now, that that was clearly a case within the act of Parliament. But here, if you look at what is stated upon the face of the case, it resolves itself into a mere misrepresentation of the quality of the article that was sold, bearing in mind that the article was of the species that it was represented to be to the purchaser, namely, plated spoons, and that the purchaser received them. Now, it seems to me, it never could have been the intention of the Legislature to make it an indictable offence for the seller to exaggerate the quality of that which he was selling, any more than it would be an indictable offence for the purchaser, during the bargain, to depreciate the quality of the goods and to say that they were not equal to that which they really were. It seems to me that this is an extension of the criminal law which is most alarming, for not only would sellers be liable to be indicted for an extravagant representation of the value of goods, but purchasers would be liable to be indicted if they improperly depreciated the quality of the goods, and induced the sellers by that depreciation to sell the goods at an under price, and below the real value of the goods, which would have been paid for them had it not been for that representation. Now, as yet, I find no case in which it has been held that this misrepresentation, at the time of sale, of the quality of the goods, has been held to be an indictable offence. In *Reg. v. Roebuck* the article delivered was not of the species bargained for, for there it was for a silver chain, and the chain that was sold was not of silver but was of some base metal and was of no value. But here, the spoons were spoons of the species that was bargained for, although the quality was inferior. It seems to me, therefore, that this is not a case within the act of Parliament, and that the conviction cannot be supported.

COCKBURN, C. J.—I am of the same opinion, and for the same reasons as those which have been just pronounced by my lord. It seems to me to make all the difference whether the man who is selling, as in this instance it appears he did, represents the articles to be merely better in point of quality than they really were. In the case of *Reg. v. Roebuck*, they were warranted to be entirely different from what they really were, where he represented them as things that were silver, when, in point of fact, they were of base metal. If

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the person had represented these as being of Elkington's manufacture, when, in point of fact, they were not, and he knew it, that would be an entirely different thing; but here what is it but a vaunting and exaggerating the value of the article in which he is dealing and representing it to be in quality equal to a particular manufacture. I think that makes all the difference between this case and the cases referred to, and I concur with my lord in his opinion that the conviction cannot be supported.

POLLOCK, C. B.—There may be considerable difficulty in laying down any general rule which shall be applicable to each particular case, and although I think that the statute was not meant to apply to the ordinary commercial dealings between buyer and seller, yet I am not prepared to lay down this doctrine in an abstract form, because I am clearly of opinion that there might be many cases of buying and selling to which the statute would apply. I think if a tradesman or a merchant were to concoct an article of merchandize expressly for the purpose of deceit, and were to sell it as and for something very different even in quality from what it was, there I think the statute would apply. So if a mart were opened, or a shop in a public street, with a view of defrauding the public, and puffing off articles calculated to catch the eye which really possessed no value, there I think the statute would apply; but I think it does not apply to the ordinary commercial dealings between man and man, and certainly, as has been observed by the Lord Chief Justice, if it applies to the seller, it equally applies to the purchaser. It is not very likely that many cases of that sort would arise. It would be very inconvenient to lay down a principle that would prevent a man from endeavouring to get the article cheap which he was bargaining for, and that if he was endeavouring to get it under the value he might be indicted for so doing. And there is this to be observed, that if the successfully obtaining your object, either in getting goods or money, is an indictable offence, any attempt or step towards it is an indictable offence as a misdemeanor, because any attempt or any progress made towards the completion of the offence would be the subject of an indictment, and then it would follow from that, that a man could not go into a broker's shop and cheapen an article but he would subject himself to an indictment for misdemeanor in endeavouring to get the article under false pretences. For these reasons I think it may be fairly laid down, that any exaggeration or depreciation in the ordinary course of dealings between buyer and seller during the progress of a bargain is not the subject of a criminal prosecution. I think this case falls within that proposition, and therefore this conviction cannot be supported.

COLERIDGE, J.—I am of the same opinion, and as far as disposing of this particular case is concerned, I should like to do it very much upon the grounds stated by Lord Campbell and the Lord Chief Justice. I am extremely glad to have the opportunity of saying I also agree with the proposition that my Lord Chief Baron has laid down in the latter part of his observations,

as it seems to me that it would be a dangerous thing to say that there could be no fraudulent misrepresentation within the statute, because it occurred in the course of an ordinary transaction of buying and selling. I think it may as often occur in the course of buying and selling in the ordinary way as in any other, but in order to determine whether a fraudulent misrepresentation is or is not within the statute, I think you must look to the extent to which it goes, and the subject-matter to which it is applied. It seems to me to be a safe rule to lay down, that where it refers simply to the quality, and is in the nature of an exaggeration on the one hand, and a depreciation on the other (which always does take place even in tolerably honest transactions between parties), it is not indictable. If you were to make those representations the subject of a criminal prosecution under the statute, or at common law, you would be not only multiplying prosecutions to a most inconvenient, but also to a most dangerous, extent. It would be making people answer criminally for that which in truth was accompanied by no criminal intent in the mind of the party using it.

CRESSWELL, J.—I agree that this conviction cannot be sustained, and I am afraid that the law upon this subject of false pretences is in a state which is well calculated to embarrass those who have to administer it. This case is distinguishable from *Reg. v. Abbott* and *Reg. v. Roebuck*. And if I may refer to what I said on a former occasion, I felt bound then by authority, I acted on it, and I think now those cases ought to be binding, unless the time has arrived when they can be overruled by an unanimous decision of the judges. In this instance we are not brought to that, and I think this conviction cannot be supported.

ERLE, J.—I am also of the same opinion, that this conviction cannot be sustained, not on the ground that the falsehood took place in the course of a contract of sale or pawning, but on the ground that the falsehood is not of that description which was intended by the Legislature. It is a representation of what is more a matter of opinion than a definite matter of fact. Whether these spoons, in their manufacture and in the electrotype, were equal to Elkington's A or not, cannot be, as far as I know, decidedly affirmed or denied in the same way as a past fact can be affirmed or denied: it is in the nature of a matter of opinion. With respect to that I fully concur in what has been said, that the statute never intended to allow a party who is dissatisfied with his bargain to resort to a complaint of any exaggerated praise of the article which was offered, and call the seller before a jury to be indicted for an offence. And, as it seems to me, not only are contracts for sale not intended to be excluded by the statute, but, on the contrary, in my opinion, the statute was precisely intended to make falsehoods in respect of contracts of sale indictable. The statute recites, that there had been a failure of justice by reason of cheats not amounting to larceny, and it thereupon makes the obtaining of goods by false pretences an indictable misdemeanor. Now,

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what were the cheats which did not amount to larceny in respect of the prosecution of which there had been a failure of justice? I think that those cheats were the cases where a party intending to defraud another of his goods, obtained from him a transfer of the property in the goods, he intending all the while to appropriate them and not to give the value of them; or the case of a man putting upon another an article which he knew was not truly the article stated, and so getting money paid for the specific thing which was shown to him, which was apparently what he intended to buy, but in reality a totally different thing; the property was under those circumstances held to have passed, the matter was held to have amounted to a cheat and not to be indictable. On the other hand, where a party intended to part with the possession only, but a fraudulent person obtained the article *animo furandi*, and took it off, though the possession so passed to him, it was held to be no transfer in law, and the property remained in the original owner notwithstanding. As in the ordinary case of a man coming up to the seller of a horse at a fair and saying, "allow me to try that horse," and he rides it away and sells it, if the jury are of opinion that he got the possession *animo furandi*, it is a larceny; but if he were to profess to the seller of the horse, "I like the horse, and I will pay you next Monday," and the seller says "I agree to that," although the jury find that he did that *animo furandi*, unquestionably that was not indictable as a larceny. Now, looking at all the cases that have been decided, those that have been the subject of the greatest comment appear to me to fall within the principle that where the substance of the contract is falsely represented, and by reason of that the money is obtained, the indictment is good; as in the case of *Reg. v. Roebuck*, where the thing sold was not the thing which it was sold for, namely, a silver chain, the silver, though in the form of an adjective, was, in reality, the substance of the contract; the silversmith had no intention of buying a mere chain, but he intended to buy so much silver, and the property of the chain passed, and the money was paid, and that clearly was a false pretence; so in the case of *Reg. v. Abbott*, the substance of the contract was not the thing, a cheese, in the shape of a cheese of any quality, but the substance of the purchase was a cheese of the identical character of the taster, which was fraudulently and falsely asserted to be part and parcel of the cheese sold; so in the case of *Everett's blacking*, a known blacking under the name of *Everett's blacking* was a vendible article in the neighbourhood; the prosecutor purchased it for the purpose of retailing it, and unless it had been *Everett's blacking* he would have had no demand for it, it was not a mere blacking he wanted, it was *Everett's*, and though that word is used adjectively, it was, in reality, the substance of the bargain. The case of *Reg. v. Kenrick* was this:—In *Reg. v. Pywell* (1 Star. 402), it was held not indictable to praise the quality of a horse knowing him not to be worthy of the character given him. I was counsel for *Kenrick*, and as far as I understand

that case, what brought it within the statute was the fact that Kenrick averred that these horses had been the property of a lady deceased, were now the property of her sister, and had never been the property of a horse dealer, all which were false assertions as to definite existing facts—very different from a mere representation that the horses were quiet to ride and drive. It may be difficult to draw the line between the substance of the contract and the praise of an article which is a matter of opinion. But the present case appears to me not to fall within the statute, upon the ground that the defendant does not affirm a definite triable fact in saying they are equal to Elkington's A, but affirms what is simply a matter of opinion. That falls within the category of undue praise in the course of a contract of sale where, as in this instance, the vendee had the article which he intended to buy, namely, plated spoons.

CROMPTON, J.—I think the conviction cannot be supported. I think the statute of false pretences ought not to be construed to extend to transactions where, in the course of a bargain for a specific chattel, the supposed misrepresentation consists in mere praise or exaggeration or puffing of the article to be sold, where the purchaser gets some value for his money. I add that, because where a man gives some inferior article which may be fairly considered to be of no value at all it is different. But I think, at all events, that we ought not to extend this statute to every case of an untrue warranty. In point of fact the party gets a worse bargain for his money, sounding much more in damages than anything else. What he really loses is the difference in value between the good and the bad article.

CROWDER, J.—I am of opinion the conviction is bad. I think the case goes further than any of those that have yet been decided. I am clearly of opinion that the cases have gone quite far enough and ought not to be extended. I think the distinction that has been taken in this case ought to exclude it from the category of those decisions, and that distinction is this: the statement is made with respect to the quality of a known article, and the quality is averred to be such with reference to an article which was then known as Elkington's A. That was a falsehood. Now, the cases that have already been decided in respect to contracts of sale and dealings between persons have not extended the principle, that where the subject-matter of the contract between the parties has been of a specific character, and the thing got is not in truth that which it was stated to be specifically, that is a false pretence. But to hold the pretence in this case to be within the statute would be to go beyond that principle, and I am very doubtful whether it was ever intended to go the length to which the decisions have carried the construction of the act.

BRAMWELL, B.—I regret to say that I have formed a very imperfect opinion in this case,—one not entirely to my own satisfaction; but it is the inclination of my opinion that this conviction ought to be sustained. I can understand that in two ways

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the statute may be interpreted; one that it does not apply to those cases where the chattel or money is got by false pretence independently of any contract, as in the case just decided, *Reg. v. Sherwood*, where, though there had been no fraud in the making of the contract, there was fraud in the assertion that the coal was of a certain amount; secondly, I can understand that the statute is intended to apply to cases where the fraud is not the immediate mode of obtaining the money, but the *contract* is obtained by fraud, and the money or the article is handed over to the defendant in pursuance of that contract. The inclination of my mind is that the statute does extend to such cases, but I cannot understand the sort of medium case which is contemplated here. It seems to be supposed that the representation was a kind of praise, exaggeration, or puffing, and therefore not criminal, so that the result would follow that suppose Elkington's spoons had got half an ounce of silver in them and the prisoner's articles had got none, he would be indictable; but if Elkington's contained one ounce of silver and the defendant's only half an ounce he would not, because it would be only the superior quality that was exaggerated. So, on a like principle, it should be held where the article had three quarters of an ounce of silver he would not be indictable, but if it had only half an ounce he would be. I cannot help looking at the statute, and I find nothing about exaggeration of quality. I find the statute express, "if any person shall by any false pretence obtain from any other person any chattel or valuable security," that means, to my mind, whether he obtains it, directly or not, by fraud. In my opinion the true meaning of the act is that it shall extend to people who make these bargains by fraud, and so by the fraud get possession of the property of others, and therefore I think the conviction ought to be affirmed.

WILLES, J.—I am of opinion at variance with those which have been generally expressed, but such as my opinion is I am bound to pronounce it, and I do so with the greater confidence, because it was the settled opinion of the late Chief Justice Jervis, than whom no man who ever lived was more competent to form a correct opinion upon the subject. I think that the conviction was right and that it ought to be affirmed. It appears to me, in looking through the cases, that a great number of the observations that have been thrown out with regard to the construction of the statute would not have been made if the words of the statute had been more strictly looked at; and that even some of the judgments would not have been pronounced if those who pronounced them had not permitted themselves to consider whether it would or would not be convenient to trade to adopt one interpretation or another. I think the words of the act should be implicitly followed, and the Legislature should be obeyed according to the terms in which it has expressed its will in the 53rd section of the 7 & 8 Geo. 4, c. 29. I am looking to the words of that section, and I am unable to bring myself to think that its framers were dealing with anything in the nature of a distinction between the case of

goods fraudulently obtained by contract and goods so obtained without any contract. The section commences with the recital, "That whereas a failure of justice frequently arises from the subtle distinction between larceny and fraud;" now this recital ought not on a proper construction, and according to those authorities by which we are bound, to have the effect of restraining the operation of the enacting clause. The enacting part of the section is, "if any person shall by any false pretence obtain from any other person any chattel, money, or valuable security, with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanor." And it appears to me that the only proper test to apply to any case is this, whether it was a false pretence by which the property was obtained, and whether it was obtained with the intention to cheat and defraud the person from whom it was obtained. Now in this case it appears that there was a false pretence; there was a pretence that the goods had as much silver upon them as Elkington's A, there was also the pretence that the foundations were of the best material. If I could bring myself to take the view which my brother Erle has taken of the statement of the case, that these were matters of opinion and not matters of fact, which could be ascertained by inspection or calculation, possibly I might arrive at the same conclusion as he has done; but it appears to me on the face of the case that Elkington's A must have been a fixed quantity, and that the proper material, the best material for the foundation of such plated articles, must have been a well known quality in the trade, because it appears that the prisoner made a statement with respect to the quantity of silver and the quality of the foundation with the intent to defraud. It appears that the person who made the advance was thereby defrauded—thereby induced to make the advance—the jury have found that the statements were known by the prisoner to be untrue, and that in consequence of these statements he obtained the money mentioned in the indictment. It appears to me that, for all practical purposes, that ought to be taken to be a sufficient fact coming within the region of assertion and calculation and not a mere speculative opinion, and that it should be considered a false pretence. If the misrepresentation was a simple commendation of the goods—if it was a mere puffing of the articles which were offered in pledge—if it was entirely a case of one person dealing with another in the way of business, who might expect to pay the price of the articles which were offered for the purpose of pledge or sale, I apprehend it would have been easily disposed of by the jury who had to pass an opinion upon the question, acting as persons of common sense and knowledge of the world. It would be a question for them in such case whether the matter was such ordinary puffing that a person ought not to be taken in by it, or whether it was a misrepresentation of a specific fact material to the contract, intended to defraud, and by which the money in question was obtained. Well, then, there is the latter part of the section "with intent to

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cheat and defraud any person of the same." It must be with the intention to cheat or defraud the person of the same, and that intention here is found to have existed, therefore I am unable to bring my mind to feel any anxiety to protect persons who make false pretences with intent to cheat and defraud. The effect of establishing such a rule as is contended for would, in my opinion, be rather to interfere with trade and to prevent its being carried on in the way in which it ought to be carried on. I am far from seeking to interfere with the rule as to simple commendation or praise of the articles which are sold, on the one hand, or to that which is called chaffering on the other; those are things persons may expect to meet with in the ordinary and usual course of trade. But as to the fear of multiplying prosecutions, I am afraid that we live in an age in which fraud is multiplied to a great extent and in the particular form which this case assumes. I agree in what the late Chief Justice Jervis stated as most peculiarly applicable, namely, that as to such a commerce as requires to be protected by this statute being limited in the mode suggested, trade ought to be made honest and conform to the law, and not the law bend for the purpose of allowing fraudulent commerce to go on. I cannot help thinking therefore, upon the fair construction of the 53rd section of the 7 & 8 Geo. 4, c. 29, the prisoner in this case having fraudulently represented that there was a greater amount of silver in the articles pledged than there really was, and that there was a superior foundation of metal (that being untrue to his knowledge), for the purpose of defrauding the prosecutors of their money, which he accordingly obtained, he was indictable, and that the conviction should be affirmed.

WATSON, B.—I am of opinion that the conviction is wrong. I think that the cases which have been decided upon this subject have gone quite far enough, and I believe much further than the framers of the statute ever intended it should go. I agree with my brother Crowder in this point, that this case does not fall within any of those decisions that have been referred to, and which are to be considered authorities to a certain extent. The question is this, whether this representation of the quality of the article which is pawned—false as it may be—is a false pretence within the meaning of the statute? In my opinion it is not. All that is represented here is, that the articles were of the first quality—equal to Elkington's A, and the foundation of the best material, and that they had as much silver as Elkington's A—all equivalent to what is called puffing. In an ordinary case, if a party wishes to protect himself he is bound to take a warranty, and if deception to a large extent were practised upon him, so that the statements made amounted to a fraudulent misrepresentation, an action would lie in that respect; but to push the matter to the extent at present contended for, you would have on every sale where any exaggeration had taken place the tradesman brought to the bar of a criminal court for obtaining money on false pretences. For these reasons I

think it is not a false pretence within the statute, and that, therefore, the conviction was wrong.

CHANNELL, B.—I am of opinion that this conviction cannot be sustained. But for the doubt expressed by my brother Bramwell, and the more decided opinion expressed by my brother Willes, I should have contented myself with saying that I concurred in the judgment of the other members of the court; but I think it right, under the circumstances, to state the grounds of my opinion. A certain number of spoons were produced to the prosecutor. Those were represented not as silver spoons, but as having silver upon them; there was, then, the further representation that they had as much silver as Elkington's, and further, that the foundation was of the best material. I consider the spoons were of the species of spoons that was represented. It is not as if the purchaser had been induced, by the representation made, to buy them for silver, and then it had been found that they were not so. The contract is made in certain terms, and the prosecutor must be taken to know that some portion of the language used, was mere matter of opinion. On that point the case is distinguishable from *R. v. Roebuck*. There the article sold did not, in truth, correspond with that represented. In this case the spoons did correspond substantially with what they were stated to be, and they were spoons of some value, supposing value to be an element to be taken into consideration. The other case, of *R. v. Abbott*, is plainly distinguishable on the ground taken by Mr. Robinson. On the whole, I am clearly of opinion that the conviction cannot be supported.

Conviction annulled.

Metcalfe and G. Francis for the prosecution.

Robinson for the defendant.

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COURT OF CRIMINAL APPEAL.

June 22, 1857.

(Before COCKBURN, C.J., COLERIDGE, CROWDER and
WILLES, JJ., and BRAMWELL, B.)

REG. v. HARRIET GRAY. (a)

*Attempt to murder—Causing bodily injury dangerous to life—Exposure of infant, occasioning temporary congestion of the lungs and heart.**To sustain a conviction under 7 Will. 4 & 1 Vict. c. 85, s. 2, for causing a bodily injury dangerous to life, with intent to murder, it is not enough to prove a merely temporary functional derangement, such as congestion of the lungs and heart arising from exposure to cold.**Where therefore a woman left her infant child exposed in an open field on a cold wet day, and it was found there after some hours nearly dead from congestion of the lungs and heart, which would shortly have proved fatal if relief had not been given, but by care it was restored in a few hours, so that no bodily injury remained:**Held, that the mother could not be convicted under the statute of causing bodily injury dangerous to life.*

THE following case was reserved by Erle, J.:—

The indictment was for causing a bodily injury, dangerous to life, to wit, a congestion of the lungs, and a congestion of the heart, with intent to murder. The verdict was guilty. The facts were these:—The prisoner left her infant child on a cold wet day lying in an open field intending that it should die, and it was found there after some hours nearly dead from the effect of such exposure; there being congestion of the lungs and the heart caused thereby, which would have been in a short time fatal, if relief had not been given at the time. When the prisoner left the child lying in the field she had not caused any bodily injury to it, and in a few hours after the child had been found it was restored by care, and there then remained no bodily injury either to the lungs or heart or otherwise, consequential from the exposure through congestion or otherwise.

Judgment was respited; the prisoner remaining in custody till the opinion of this court could be taken on the question whether, on these facts, the conviction for causing a bodily injury dangerous to life was right.

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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injury.*

No counsel was instructed for the prisoner.

Couch, for the prosecution.—This conviction is right. The learned judge at the trial seemed to think that under the section in question (7 Will. 4 & 1 Vict. c. 85, s. 2), the bodily injury, dangerous to life, must be of a like nature with the injuries previously mentioned in the same section, that is, stabbing, cutting or wounding; but it is submitted that the words, upon which this indictment is framed, constitute a distinct provision, and create a different offence. The object of the Legislature has been, by various successive enactments, to include, as far as possible, every kind of attempt to murder; and in order to accomplish that object, the general words at the end of the section "or by any means cause bodily injury dangerous to life," were inserted.

COLERIDGE, J.—The question here is, whether there was really any bodily injury.

Couch.—Congestion of the lungs and heart which would shortly have caused death.

COLERIDGE, J.—Suppose a child put into an exhausted receiver, where life could not last many seconds, but taken out in time and without sustaining any bodily injury; would that be a case within the statute?

Couch.—There must be injury at some time, but it need not be permanent. If a child were shut up in a room filled with the fumes of charcoal, and sustained bodily injury of any kind, whilst it was left there, it would be no answer to say that it was afterwards completely restored.

COCKBURN, C. J.—But must there not be lesion of some organic structure to satisfy the statute? All the previous offences created by the same section, are cases of injury to the bodily structure. The consequence of the exposure in the present case appears to have been only temporary functional derangement, and that of very short duration.

CROWDER, J.—Poisoning is one of the cases to which this section relates.

Couch.—The offences of stabbing, cutting and wounding, provided for by this section, are different from that of causing bodily injury dangerous to life, in this, that the wounds need not be dangerous to life at the time when inflicted.(b)

COLERIDGE, J.—I think that the object of the Legislature in inserting the words "or by any means cause bodily injury dangerous to life," was to meet cases of serious bodily injury inflicted without the use of instruments, as by biting or striking with the fist, which had been held not to be included under former acts.

Couch.—Therefore the most general words are used "by any means."

(b) *R. v. Hunt*, 1 Moo. C. C. 93.

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COCKBURN, C. J.—Must not the means be used for the purpose of producing the particular bodily injury sustained? If the attempt be simply to kill, but not to produce any particular bodily injury, would that be within the section?

BRAMWELL, B.—Suppose the prisoner had placed the child somewhere, and then directed upon it a blast of cold air or a stream of water with intent to kill, would that have been within the statute? And, if so, is there any difference between that and exposing it to the weather?

Couch.—The cases are identical; for the prisoner must be assumed to have intended to kill the child by the means by which cold and wet would kill it. This is a case of internal injury; and it has been held that an internal wounding is within the section.(c)

Cur. adv. vult.

JUDGMENT.

COCKBURN, C. J., now delivered the judgment of the court. This case was argued before my brothers Coleridge, Crowder, Willes, Bramwell, and myself, on a point reserved by my brother Erle, as to whether the prisoner who had exposed her child, whereby temporary congestion of the lungs had taken place in the child, was liable to be indicted and convicted under the 7 Will. 4 & 1 Vict. c. 85, s. 2. We are of opinion that the conviction in this case cannot be sustained. We think that, looking to the words of the act of Parliament and the other offences provided for by the 2nd section of the 7 Will. 4 & 1 Vict. c. 85, the condition of the child's organs not having been attended with any lesion, there was no bodily injury dangerous to life within the meaning of the statute. The conviction therefore must be quashed, and the prisoner discharged.

Conviction quashed.

(c) See *R. v. Smith*, 8 Car. & P. 173; *R. v. Warman*, 1 Den. C. C. 183.

COURT OF CRIMINAL APPEAL.

June 22, 1857.

(Before COCKBURN, C.J., COLERIDGE, CROMPTON, and
WILLES, JJ., and MARTIN, B.)

REG. v. AUTEY. (a)

*Forgery—Warrant or order for payment of money—Shareholder's
indorsement on railway dividend warrant.*

*The dividend warrants of a railway company, signed by the secretary
and addressed to a banker, required the latter to pay the amount to
the shareholder or order, and to charge the same to the company's
revenue account. That document required the shareholder's indorse-
ment, without which the banker would not pay the money even to the
shareholder himself:*

*Held, that a clerk of the company who had forged the shareholder's
indorsement, was properly convicted of forging a warrant or order
for the payment of money.*

THE following case was reserved and stated by Crompton, J.
The prisoner, Edward Autey, was tried and convicted before
me at the last Assizes for the county of York, upon an indictment
charging him, in one count, with uttering a warrant for the pay-
ment of money, and in another count with uttering an order for
the payment of money.

The prisoner was in the employment of the Leeds, Bradford,
and Halifax Junction Railway Company, and it was the duty of
him and a fellow clerk to fill up the dividend warrants payable to
the proprietors, and to place the stamps on them and the initials of
the company on the stamp, and then to take them to the secretary
of the company to sign, and afterwards to post them.

The instrument in question was regularly and in the course of
their duty made out by the prisoner and his fellow clerk, and was
properly stamped and initialed by them, and was afterwards duly
signed by the secretary.

The indorsement of Thomas Thompson Cunliffe Lister, the
proprietor in whose favour the document was drawn, was forged
after the document had been signed by the secretary, and the

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prisoner uttered the document with the forged indorsement knowing it to be forged.

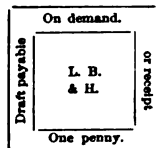
The following is a copy of the instrument and indorsement:—

LEEDS BRADFORD AND HALIFAX JUNCTION RAILWAY
COMPANY.

Offices, Great Northern Station, Bradford,
9th June, 1856.

No. 338.

£13 11s. 7d.



THE LEEDS BANKING COMPANY, LEEDS.

Pay to Thomas Thompson Cunliffe Lister, or
order, thirteen pounds eleven shillings and seven-
pence, which charge to the Company's revenue
account.

MARTIN CAWOOD,
Secretary.

The shareholder's name must be indorsed at the back of the check.

Indorsement.

T. T. CUNLIFFE LISTER.

It was proved at the trial that the bankers would not have paid the money mentioned in the order, even to the proprietor himself, without his indorsement.

I reserved the case for the opinion of the Court of Criminal Appeal, and the question is, whether the prisoner was properly convicted of uttering either a warrant for the payment of money or an order for the payment of money.

The learned judge referred to *R. v. Arscott*: (6 Car. & P. 408; 2 Russ. Crim. 514.)

Saturday, April 25th.

Price, for the prisoner.—The evidence does not support the indictment. There is no evidence of forgery or uttering any warrant or order for the payment of money. Where the charge is of forging some particular instrument, it must be shown that either the whole or some material part of the instrument has been forged, otherwise the charge should be confined to the part which was in fact forged. In this case it was essential to prove that some part of the instrument was forged, which was necessary to its character as a warrant or order for the payment of money, and in that respect the proof failed; because the indorsement was not material to its character as an order or warrant to pay money. All that is essential to an order to pay is that it should purport to be made by one having authority to order the payment and upon one com-
pellable to pay: (*R. v. Vivian*, 1 Den. C. C. 35)

COLERIDGE, J.—Suppose the instrument had been "Pay to T. C. Lister's Order," and then his indorsement had been forged. Would not that have been forgery of an order to pay? It is not an order for payment of money till T. C. Lister indorsed it.

Price.—But, according to the form of order as set out in the case, it was not necessary that he should indorse unless he wished some one else to get the money.

COLERIDGE, J.—But was not his indorsement, at all events, an order to pay?

Price.—The instrument was a complete order to pay without it; and the addition of the indorsement did not at all alter the nature of the instrument, any more than crossing a cheque alters the nature of it. In fact, the indorsement was no more than a receipt which the shareholder was required to give to the banker.

COCKBURN, C. J.—Was not the instrument an order to pay subject to a condition?

CROMPTON, J.—But for the condition as to indorsement, it would be a bill of exchange.

Price.—If a bill of exchange, it should have been so described in the indictment.

CROMPTON, J.—If the indorsement is part of the instrument, it is not a bill of exchange, nor was it a complete authority to pay until indorsed.

Price.—Then it should have been alleged that the indorsement was necessary to its validity as an order. But, in truth, that is not the case; for upon the face of the document itself it was an order when it left the railway office, within the meaning of the statute.

COLERIDGE, J.—Could the banker have paid without the indorsement?

Price.—He would, probably, have been compellable to do so.

CROMPTON, J.—May not parties impose a condition upon an order or promise to pay, which will prevent it from being a bill of exchange or promissory note, but not prevent it from being an order or promise to pay?

Price.—Yes; such conditions are frequently imposed for the security of the bankers who are to pay; but compliance with the condition is not essential to give validity to the order. *R. v. Arscott* (6 Car. & P. 408), is a distinct authority to show that the forgery of an indorsement upon an order for the payment of money is no offence within the 3rd section of 11 Geo. 4 & 1 Will. 4, c. 66.

COLERIDGE, J.—There the forgery charged was of an indorsement upon an order.

CROMPTON, J.—And the statute has not provided for that case. The section expressly provides against the forgery of any bill of exchange or of any indorsement of any bill of exchange; it also provides against the forgery of any order for the payment of money, but not of any indorsement upon such an order. The judges in *R. v. Arscott* seem to have relied upon that distinction, and to have thought that an indorsement upon an order could not be treated as an order under that section; otherwise one might have thought that an indorsement upon such an order is itself

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COLERIDGE, J.—It is not decided there that the forgery of an indorsement may not, under some circumstances, be the forgery of an order for payment of money.

MARTIN, B.—In *Arscott's* case it was a receipt indorsed on a bill of exchange.

COLERIDGE, J.—And Littledale, J., disposed of the count for forging a receipt upon the merits.

Price.—If it is an indorsement upon an order, the statute does not apply; and that is the present case. No indorsement was required to make it an order, nor did the indorsement alter its character. The memorandum as to indorsement was an intimation only as to the mode of payment. It was tantamount to saying “make the shareholder give you a receipt.” It was collateral to the general purpose of the instrument, and might have been given in a separate note. The case of *R. v. Illidge* (1 Den. C. C. 404; 3 Cox Crim. Cas. 552), is very much in point, because there “a tasting order” for wine from a wine merchant, which requires the signature of a clerk of the Dock Company before the person bringing it is allowed to taste, was held to be an order for the delivery of goods.

J. B. Maule, for the prosecution.—The principles laid down in the argument for the prisoner are correct; but they are inapplicable to the present case. The indorsement in this case is as material as any other part of the order. Without it, indeed, the instrument had no value. It is not like the case of a crossed cheque, where the instrument is perfectly valid and effectual without the crossing; or the case of a bill of exchange, which is a perfect instrument without the indorsement. For the purpose of obtaining money upon it, this order was not available or complete until indorsed; and the forgery of a material part of any instrument may be described in an indictment as the forgery of the whole. In *Reg. v. Atkinson* (2 Moo. C. C. 215; Car. & M. 325), where it was shown to be the custom of bankers to give receipts on the deposit of money in the following form:—“Received of A. B. 85*l.* to his credit. This receipt not transferable;” and to repay the same with interest on the return of the receipt with a name written on it, it was held that the forging the name of A. B., and receiving the money due on its return, was a forging and uttering of an acquittance for the 85*l.* and interest. According to the case of *R. v. Vivian*, there cannot be an order for payment of money unless there be a person compellable to pay; and here no person was compellable to pay until the signature of the payee was indorsed upon the paper. There was, therefore, no order for payment of money within the meaning of the statute until the indorsement was made. In *R. v. Arscott*, the ground of the decision was that orders are not instruments which pass by indorsement, and that for that reason the statute had mentioned indorsements upon bills of exchange, but had not mentioned indorsements on orders for payment of money. But in this case the order was one which was not negotiable without indorsement.

CROMPTON, J.—Yes; this order would be an instrument negotiable by indorsement within the meaning of Littledale, J., in that case.

Maule.—The fault there was in describing the instrument forged as an indorsement upon an order; and so charging an offence not known to the law. Here the instrument is properly described in the words of the statute; and the evidence proves a forgery of a material part. Even the attaching of a seal to an instrument has been held to constitute forgery of a deed.

Price, in reply.—If this was an instrument negotiable by indorsement, it should have been so described in the indictment; or the instrument itself should have been set out, and then brought within the statute by express averments.

COLERIDGE, J.—But what was the character of the whole instrument when it was uttered by the prisoner? Was it more than an order for payment of money?

Price.—Yes; it was an order for the payment of money with a forged indorsement or representation thereon, that the prisoner was the person entitled to payment.

COCKBURN, C. J.—You say that the banker would have been compellable to pay without any indorsement; but compellable by whom?

Price.—By the drawer.

COCKBURN, C. J.—Then he is answered by his own direction not to pay it without indorsement.

Price.—If a condition is attached, the character of the instrument is altered.

CROMPTON, J.—It may perhaps be put, that the indorsement is a mere compliance with a condition rather than an order by the shareholder upon the banker, whom he would have no right to order except in pursuance of the instrument.

Price.—Suppose that all the rest of the document was forged, and only the signature on the back genuine, it would still be a forged order for the payment of money.

CROMPTON, J.—Yes; but if two signatures are necessary to a perfect order, the forgery of either may be charged as the forgery of the whole document.

Price.—That is so; but it is not applicable to this case. The requiring an indorsement is a matter of convenient regulation for a large body of shareholders; but the indorsement itself is quite a collateral thing, without which there is a perfect order by the company upon the banker to pay the shareholder.

Cur. adv. vult.

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JUDGMENT.

CROMPTON, J., delivered the judgment of the court.—There appears to have been no authority to pay the money mentioned in the document in this case without the indorsement of the proprietor, and that indorsement may be considered as necessary to make the

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instrument in question a perfect order or warrant authorizing or requiring the payment. Whether the document be regarded as the warrant or order of the company upon their bankers, or whether it be regarded as the warrant or order of the proprietor to the bankers to pay out of the company's funds (made subject to his order to the amount specified in the instrument), it still is imperfect without the proprietor's indorsement, and contained neither an authority or request to pay without such indorsement. We think, therefore, that the forging of the signature of the proprietor amounted to a forgery of the entire document, and that such document was properly described as a warrant or order for the payment of money, and that this conviction should be confirmed.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

June 23, 1857.

(Before COCKBURN, C.J., COLERIDGE, WILLIAMS, CROMPTON,
and WILLES, JJ., and MARTIN, B.)

REG. v. GEORGE CRYER. (a)

Venue—Jurisdiction—Felonious receipt—Transmission of stolen note by post—Stat. 7 & 8 Geo. 4, c. 29, s. 56.

The half of a country bank note having been stolen at some period during its transit from S. in Wilts, to Bristol, was afterwards enclosed by the prisoner in a letter addressed to the bankers at S. demanding payment, which letter was posted at Bath. There was no other evidence of any receipt or possession by the prisoner in Wilts.

Held, that the prisoner was rightly tried in Wilts, as the possession either of the post office servants or the bankers was his possession; and the case was therefore brought within stat. 7 & 8 Geo. 4, c. 29, s. 56.

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by Williams, J.

George Cryer was convicted before me at the last Assizes at Salisbury, for receiving the half of a 5*l.* note, knowing it to have been stolen. The question I have reserved for the consideration of the Court of Criminal Appeal is, whether there was any jurisdiction to try him in the county of Wilts. The facts were that the note in question had been issued by the country bank at Swindon in Wiltshire. The one half of the note had been sent by post from Swindon, by a tradesman there to his correspondents in Bristol, and duly received by them. The other half was put by him into a letter which was posted at Swindon, but it was stolen in its transit by some person and in some way unknown.

There was sufficient proof that the prisoner had received the stolen half of the note with a guilty knowledge, and that he had enclosed it in a letter to the bank at Swindon, requesting payment of it, which he had put into the post office at Bath, and which arrived with its contents in due course at Swindon; but there was no evidence that the stolen half of the note was received by the prisoner in Wiltshire, or was ever in his possession in that county, unless, as it was contended on behalf of the prosecution, the bankers

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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session in county
by agent.

at Swindon, to whom the stolen half note had been remitted, or the post office servants in the county can be regarded as his agents for transmitting the stolen property, and their possession in the county of Wilts can be treated as his possession.

This case was not argued by counsel, but was considered by the judges above named.

JUDGMENT.

COCKBURN, C.J., now delivered the judgment of the court.—We think that the conviction was right. Even at common law the venue would, perhaps, be proper, treating the receiver as an accessory after the fact, and supposing him to have dealt with the stolen note personally or by his agent in Wiltshire, by handing it to the bankers in that county to get it changed. But the statute 7 & 8 Geo. 4, c. 29, s. 56, expressly enacts that a receiver of stolen goods may be tried in any county in which he shall have had the stolen property in his possession. The question then appears to be simply whether the possession of the post office servants or that of the bankers who received it in Wiltshire, by means of the prisoner and for his purposes, can be regarded as his possession. And we think that it can. It is plain that if he had employed a private agent to give it to the bankers in order to get it cashed, the possession, in point of law, would all along have remained in the prisoner. And why should it the less because it is transmitted through a public agent by means and on behalf of the prisoner. In accordance with this view is that taken in *R. v. Jones*: (19 L. J. 162, M. C.; S. C. 1 Den. C. C. 551; 4 Cox Crim. Cas. 198.)

Conviction affirmed.

Ireland.

COURT OF CRIMINAL APPEAL.

January 24, 1857.

(Before MONAHAN, C. J., PERRIN and JACKSON, JJ.,
RICHARDS and GREENE, BB.)

REG. v. O'DONNELL. (a)

Taking reward for restoring stolen property—7 & 8 Geo. 4, c. 29, s. 55 (English)—9 Geo. 4, c. 55, s. 51 (Irish)—Examining acquitted prisoner for the Crown—Animus furandi to constitute larceny.

Where a witness has been rightly, by direction of the court, acquitted, he may be examined for the prosecution.

If property be taken with the intention of holding it until the rightful owner should pay a certain sum, and compelling such payment, this is sufficient to complete the offence of larceny.

It is not necessary in order to bring a case within the above acts, that the money paid for the purpose of procuring the return of stolen property should be paid before the property was actually restored, provided it was paid in pursuance of a previous agreement on the subject.

THE following case was stated by the Lord Chief Justice of the Common Pleas:—

Charles O'Donnell and Abraham Sweeny were tried before me at the last assizes for the county of Donegal, for corruptly and feloniously taking and receiving from Francis Peebles the sum of 6*l*., on account of helping the said Francis Peebles to a certain mare which had before then been feloniously stolen from the said Francis Peebles, without having caused the person who stole the same to be apprehended and brought to trial.

The first witness was William Peebles, the son of Francis Peebles, who deposed that his father and the prisoner O'Donnell both resided in this county; that on the 28th April last he went to O'Donnell to assist him in drawing out manure, and brought with him his father's mare and cart; that on the evening of that day, at the instance of O'Donnell, he went into O'Donnell's to take his

(a) Reported by P. J. M'KENNA, Esq., Barrister-at-Law.

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supper and turned the mare out on the pasture at O'Donnell's; that when he had eaten his supper he went out for the mare, but she was nowhere to be found; that he searched everywhere for her that night and the next day and could not find her. In the course of the next day the prisoner O'Donnell said to witness, that if witness's father would get Mr. Sproule, the agent, to pay to him, O'Donnell, 8*l.* or 9*l.*, that three or four of the neighbours would go out and find the mare, and that unless the matter was settled the mare would be removed a day or a day and a-half's journey. O'Donnell proposed Sweeny as his arbitrator to decide how much witness's father should pay. O'Donnell said he would not take less than 12*l.*; witness said he would agree to give the 12*l.*, as he could not get her otherwise. On the 30th April witness got the collar and harness at O'Donnell's, and same day the mare came back of her own accord and stopped at the stable door.

On his cross-examination he stated that his father did not owe any money to O'Donnell; that his father had bought a farm from O'Donnell for 68*l.*, which he paid him, 50*l.* to himself, and about 18*l.*, the arrears of rent due to the landlord, to Mr. Sproule, the agent.

The next witness was Francis Peebles, who stated that he bought a farm from O'Donnell for 68*l.*; that in pursuance of the agreement he paid part of the 68*l.* to Mr. Sproule the agent, being the amount of rent due by O'Donnell, and the residue to O'Donnell; that on the 28th April he sent his son, the last witness, to O'Donnell's to draw manure for him; that his son returned late at night without the mare; witness and his son spent the next day in looking for her, O'Donnell proposed to witness that if Mr. Sproule would return to him (O'Donnell) 8*l.* or 9*l.* of the money paid to him, that he (O'Donnell) and three or four of the neighbours would search for and find the mare; at length witness proposed to O'Donnell to pay him 5*l.* or 6*l.* if he would get the mare for him; this O'Donnell at first declined, preferring that the amount to be paid should be settled by arbitration; at length O'Donnell proposed to take 12*l.*, which witness refused to give, but witness gave Sweeny 6*l.* to give to O'Donnell, desiring him to be very careful not to part with the money till he saw the mare coming home. On cross-examination he stated that he did not owe O'Donnell any money at the time.

The next witness was Thomas Wilson, who stated that he knew O'Donnell and Sweeny; saw them one evening in his house, and that they wanted him to arbitrate between them.

There being no other witnesses for the prosecution, I, at this stage of the case, directed Sweeny to be acquitted, which was accordingly done, and I permitted him then to be examined as a witness against O'Donnell. He stated as follows:—

I got the 6*l.* from Peebles and gave it to O'Donnell in regard of the farm sold by him to Peebles; I told him I had the 6*l.* to give him, but that I could not part with it till the mare was returned; I took care to see that the mare was sent home before I paid him

the 6*l*; the mare was in fact at home before I parted with the money.

Dowse, for the prisoner O'Donnell, objected to my directing Sweeny to be acquitted, or receiving his evidence against O'Donnell; he also insisted that, as the mare was in fact returned before the payment of the money to O'Donnell, it was not a case within the act; and also that if the taking of the mare was not for the purpose of converting her to the use of O'Donnell, or the person who took her, but merely by taking her to force Peebles to pay a sum of money for her return, that did not amount to a felonious taking within the statute. I ruled differently, and charged the jury that if O'Donnell had got some person to take away the mare with the intention of obliging Peebles to pay him a sum of money for the return of the mare, which, in fact, he knew he had no claim for, that same was a felonious stealing of the mare; and that if the mare having been so stolen, O'Donnell had her returned, knowing that when she should be so returned he would be paid the sum of 6*l*., and that sum was in fact afterwards paid really and *bonâ fide* for having the mare returned, though nominally as on account of the dealings in respect of the farm, that same was a case within the act. The jury were of opinion that O'Donnell had got some person to take away the mare in order to extort from Peebles money which he knew he had no claim to, for a return of the mare, and that O'Donnell had the mare returned, knowing that the money had been deposited with and would be paid to him by Sweeny; and it was in fact paid for the return of the mare, though nominally in relation to the farm, and accordingly found the prisoner O'Donnell guilty. At the instance of Mr. Dowse, counsel for the prisoner O'Donnell, I respited sentence, and discharged him on entering into recognizance, with two sureties, to appear at the next assizes to receive sentence, and I reserved the following questions for the consideration of the Court of Criminal Appeal:—

First, had I authority to direct the acquittal of Sweeny and receive his evidence against O'Donnell?

Secondly, was I, under the circumstances stated in this case, correct in informing the jury that a taking away of the prosecutor's mare, with the intent and for the purpose of obliging him to pay a sum of money for her restoration, was a felonious stealing within the act?

Thirdly, does the fact of the payment of the money having been made after the return of the stolen property, though in pursuance of a previous agreement and understanding, prevent the case from being within the statute of 9 Geo. 4, c. 55, s. 51?

January 3, 1857.

JAMES HENRY MONAHAN.

Dowse, for the prisoner (after stating the facts).—As to the first point, I say that the judge was wrong in directing the jury to acquit Sweeny, and then admitting his evidence against O'Donnell; Sweeny should not have been acquitted. In *Reg. v. Pascoe* (1 Den. C. C. 456), A. was indicted under the statute 7 & 8 Geo. 4, c. 29, s. 58, for feloniously taking money from B., on account of helping B:

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to certain goods before that time stolen from B., the said A. not having caused the thief to be apprehended and brought to trial for the same. The jury found that A. knew the thieves, and assisted B., as her agent and at her request, in endeavouring to purchase the stolen property from them, not meaning to bring the thieves to justice. They also found that he did not mean to screen the guilty parties, or to share the money with them; also that he did not intend to assist the thieves in getting rid of the stolen property by promising B. to buy it; and it was held on the above state of facts that a conviction was legal and proper: (*Cooper v. Slade*, 2 Jur. N. S.) It has been the practice to hold so on the circuit. Therefore the learned judge was wrong in directing Sweeny to be acquitted, and then admitting his evidence against O'Donnell.

PERRIN, J.—Suppose a man send his son or his servant to pay money for getting back his property, do you contend that such a messenger would be liable?

DOWSE.—Yes: that is the substance of the decisions on the subject. If the direction to acquit were wrong, this conviction was bad, as Sweeny was improperly allowed to give evidence. Again, even if the direction were right, the Crown had not a right to call an acquitted prisoner. There is a reason for the rule which admits the evidence of an acquitted prisoner for the defence, namely, that otherwise prosecutors would have it in their power, by indicting persons who could depose to material facts for the defence, to deprive a person charged with an offence of proper and necessary evidence; but for allowing a prisoner who has been acquitted to give evidence for the Crown there is no such reason. The Crown ought to know their own case, and not try to make it out by taking a man out of the dock.

PERRIN, J.—I have an imperfect recollection of a case before the late Baron Foster, where prisoners were tried for a felony. One of them, by the direction of the baron, was acquitted, and his evidence was received against the other prisoners, whom he convicted. My impression is that he respited sentence, and after consideration directed the persons convicted to be discharged.

RICHARDS, B.—It was always understood that when a man was acquitted, he was a free agent, and competent as any other person in the community to give evidence.

JACKSON, J.—Can a man be half competent to give evidence? You admit Sweeny might give evidence for the prisoner—why not against him?

DOWSE.—There is a case which may be relied on by the other side: (*R. v. Rowland*, Ryan & Moody, 401.) That was an indictment for a conspiracy, and before opening the case, the counsel for the prosecution applied to have two of the defendants acquitted, that he might call them as witnesses. On the counsel for the other defendants observing that he supposed he had no power of objecting, Abbott, C. J. said, "I think you have not; they must be acquitted now." Their evidence was received and convicted the others. That was not a decision upon argument; but the chief

difference between that case and the present is, that there the defendants had not been given in charge; a *nolle prosequi* might be entered, but when once given in charge, a prisoner must be either convicted or acquitted. Now, as to the second question, there was no larceny here. In order to constitute larceny there should be a taking against the will of the owner without any pretence of right, with intent wholly to deprive the owner of his property, and to appropriate or convert it to the use of the taker. Now, here the property was taken with the intention of returning it on payment of money claimed to be due. There was no *animus furandi* in this instance. As to the third question, the act is to be construed strictly and favourably to the prisoner; and when the money was paid voluntarily after the mare was sent back, it cannot properly be said to have been paid for getting her back. The words of the act are: "Every person who shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of helping any person to any chattel, &c., which shall have been stolen." It was to suppress a system of extorting money by such means as procuring the return of stolen property that the act was passed; here the payment was, under the circumstances, a voluntary one, and not within the contemplation of the Legislature. There are no words to meet the case of a person getting money for having returned property.

Robert Johnson, for the Crown.—If a man were found guilty of an offence his evidence would now be admissible: (6 & 7 Vict. c. 85, s. 1.) How then can it be argued that the evidence of a man who is acquitted should not be receivable? As to the larceny point, it is not necessary that there should be, on the part of the taker, an intention of appropriating, such as is contended for by *Mr. Dowse*. An intention of getting money by a disposal in any way of the stolen property is sufficient: *Reg. v. Manning and Smith* (1 Dearsley C. C. 21), establishes this proposition. There a person in the prosecutor's employment carrying out an arrangement to cheat his master, took a number of bags out of a warehouse and left them in a place where bags were usually delivered, with the intention of assisting another to get payment for the sacks. The jury found that the bags had been removed in pursuance of a previous arrangement, and it was held that the prisoner was rightly convicted of larceny. So in *Reg. v. Hall* (1 Den. C. C. 381), it was held that if A. takes the goods of B. wrongfully, and offers them for sale to B. as the goods of another, he is guilty of larceny.

Dowse, in reply.—Taking goods to resell them to the original owner, as in both the cases cited, is quite different from taking them to compel payment of a sum of money.

MONAHAN, C. J.—We are all of opinion that the conviction was right, and that the jury were right in their finding on the question submitted to them. It is true there may not have been a larceny committed, but we think there was evidence to justify the jury in such a finding. With regard to the question as to whether *Sweeny's* evidence was properly receivable, we are all of opinion

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that, having been acquitted, he was restored to all his previous competency as a witness either for the Crown or for the prisoner. The only other point in the case is, that because the money was not paid until after the mare had been returned, the case did not come within the words of the act. We think that, inasmuch as he was aware he was to get the money and return the animal on that account, and afterwards got it, it comes within the words "upon account of helping any person to any chattel, &c. stolen."

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

May 30, 1857.

(Before Lord CAMPBELL, C.J., COCKBURN, C.J., POLLOCK, C.B., COLERIDGE, CRESSWELL, ERLE, CROMPTON, and WILLES, JJ., and BRAMWELL, B.)

REG. v. LISTER AND BIGGS. (a)

Nuisance—Misdemeanor—Inflammable materials warehoused in populous neighbourhoods—danger ab extra.

An indictment stated that the defendants unlawfully, knowingly, and wilfully, did deposit and cause to be deposited in a warehouse belonging to them, and near to divers streets, common highways, and dwelling-houses, divers large and excessive quantities of a certain dangerous ignitable and explosive fluid called wood naphtha, and did unlawfully, knowingly, and wilfully keep in the said warehouse, and near to the said streets, &c., the said fluid in such large, excessive, and dangerous quantities, that the Queen's subjects in passing along the said streets, &c., and the same who were residing near the said warehouse were in great danger and peril of their lives and properties, and were kept in great alarm, fear, and terror, to their common nuisance.

Held, that the indictment disclosed an indictable offence, although there was no statement of any noxious effluvia arising from the said premises, or of any substantial injury sustained by any one beyond the fear and the danger caused by the substances being so kept.

The evidence in support of the indictment showed that wood naphtha is the product of the distillation of wood, is very inflammable, more so than spirits of wine, or even than gunpowder itself, and that if inflamed, water, unless applied in enormous quantities, would not put it

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

out, and that, practically, a fire happening could not be quenched, and would produce very disastrous consequences to the neighbourhood. But it was proved also that it was the practice in the warehouse never to allow any candle, fire, or gaslight to enter therein, and so long as that continued, the storing of the wood naphtha and the spirits would not produce any danger.

Held, that it was a question for the jury whether there was any real danger to life and property arising from the way in which the materials were kept, and that danger ab extra alone, was sufficient to justify them in finding a verdict of guilty.

The evidence of the way in which the business was carried on, was this: the quantities stored were from 4000 to 5000 gallons of wood naphtha, and from 40,000 to 45,000 gallons of spirits of wine. The operation of mixing the two together was carried on upon the premises. For this purpose, there were two large vats erected; each of these was capable of holding about 2000 gallons of the mixture. The vats were covered over entirely at the top, with the exception of an aperture in the centre of the cover, in which was fixed a hopper with a sliding panel of wood. When it was necessary to mix, the spirits of wine first and the naphtha afterwards were poured through the hopper into the vat below; where, by the chemical action upon each other, they became intermixed and were drawn off at the bottom by a cock, and carried away for the purposes of commerce. The wood naphtha was kept in the warehouse in curboys holding twelve gallons each, and carefully stocked till required for the purpose of being thus mixed.

Held, that this was sufficient evidence to support the charge in the indictment of depositing the article in a warehouse, dissentiente, POLLOCK, C. B., who thought the conviction in this particular instance wrong, because the allegation of depositing the article in a warehouse was sought to be supported by evidence of a dangerous use of it by mixing, and he suggested the propriety of another indictment being preferred.

THE following case was reserved at the Central Criminal Court, on the 21st of December, 1855, by the late Baron Alderson; and having been argued on the 19th January, 1856, was re-argued before the fifteen judges, May 11th, 1857.

“The defendants were indicted for a public nuisance, in keeping and storing large quantities of wood naphtha and rectified spirits of wine in a warehouse in Suffolk-lane, which runs between Thames-street and Cannon-street, in the city of London. It appeared in evidence that the quantities so stored were from 4000 to 5000 gallons of wood naphtha, and from 40,000 to 50,000 gallons of spirits of wine. The operation of mixing the two together was carried on upon the premises; for this purpose there were two large vats erected, each of which was capable of holding about 2000 gallons of the mixture. The vats were covered over entirely at the top, with the exception of an aperture in the centre of the cover, in which was fixed a hopper with a sliding panel of wood. When it was necessary to mix, the spirits of wine first and the naphtha afterwards were poured through the hopper into the vat below; where, by their chemical action upon each other, they became intermixed and were drawn off at the bottom by a cock,

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and carried away for the purposes of commerce. The wood naphtha was kept in the warehouse in carboys, holding twelve gallons each, and carefully stocked till required for the purposes of being thus mixed. It is a product of the distillation of wood and is very inflammable, more so than spirits of wine, or even than gunpowder itself, passing into vapour on the application of a heat of 140° Fahrenheit, and if inflamed, water could not put out the fire arising from it, unless that water was applied in enormous proportions relatively to the quantity of inflamed naphtha; and Doctors Taylor and Letheby were of opinion, and as to this there was no dispute, that, practically, a fire arising and communicating with the quantity kept upon these premises could not be quenched, and would produce very disastrous consequences to the neighbourhood: but it was proved also that it was the practice in the warehouse never to allow any candles, or fire, or gaslight to enter therein, and so long as that continued, the storing of the wood naphtha and the spirits would not produce danger; but it was contended, on the part of the Crown, that to keep articles so easily liable to accident, and so dangerous in the result if an accident happened, in the populous neighbourhood in which this manufactory was situate, was a public nuisance, inasmuch as fire might incautiously be introduced, or a fire arising in any of the adjoining houses might communicate therewith, and that the existence of such a manufactory, therefore, was a just ground for apprehension and alarm to the surrounding neighbourhood, and therefore a nuisance, and the case was compared to the keeping of a large magazine of gunpowder (*Rex v. Taylor*, 2 Strange 1167), which was said to be a nuisance at the common law. The defendants were by my direction found guilty, but I respited the judgment and request the opinion of the judges on the point whether, when the manufacture, as carried on (which was carefully) produced in the opinions of the scientific men no danger, its liability to danger *ab extra* made it a public nuisance?"

The following was the form of the indictment:—

Central Criminal Court, } The jurors for our Lady the Queen,
to wit. } upon their oath present, that J. S. L.
and B. B., severally late of London, merchants, not having regard to the lives and security of Her Majesty's liege subjects, heretofore, to wit, on the 24th day of June, in the year of our Lord one thousand eight hundred and fifty-five, in London, and within the jurisdiction of the Central Criminal Court, unlawfully, knowingly, and wilfully, did deposit and cause to be deposited in a certain warehouse and premises of them the said J. S. L. and B. B., and near to divers streets and Queen's ancient and common highways there, and also to divers dwelling-houses of her said Majesty's liege subjects, to wit, in Suffolk-lane in London aforesaid, divers large and excessive quantities of a certain dangerous, ignitable and explosive fluid, called wood naphtha, to wit, 10,000 gallons of the said fluid, and from the day and year aforesaid until the day of the taking of this inquisition in London aforesaid, and within the

jurisdiction of the Central Criminal Court, unlawfully, knowingly, and wilfully did keep in the said warehouses and premises, and near to the streets, highway, and dwelling-houses aforesaid, the said fluid in such large, excessive and dangerous quantities as aforesaid, by reason of which said premises the liege subjects of our said Lady the Queen, during the time aforesaid, passing and proceeding in, through, and along the said streets and highways, and the liege subjects of our said Lady the Queen, near to the said warehouse and premises residing and being, were in great danger and peril of their lives and property, and were kept in great alarm, fear, and terror, and were greatly impeded, disturbed and incommoded in the performance of their lawful occupations, and prevented and deterred from using the said streets and highways, and from passing and repassing over, through and along the same, as otherwise and but for the premises aforesaid they could, might and ought to have done, to the common nuisance of all Her Majesty's liege subjects and to the endangerment of their lives and property, and against the peace of our Lady the Queen, her crown and dignity.

Parry, Serjt. for the defendants.—In the count on which the conviction has taken place there is no statement of an offence at common law.

LORD CAMPBELL.—It is difficult to say that there is no evidence of an offence at common law, but it does not appear to have been left to the jury. The judge has directed a verdict to be entered. Now there is an allegation that large quantities of naphtha were deposited. There was abundant evidence of that, but still it was a question for the jury, whether the allegation was proved, and it does not appear to have been left to them.

COLERIDGE, J.—Is not the question whether the existence of danger *ab extra* is sufficient to constitute an offence?

Parry.—It is submitted that no fear of danger *ab extra* is sufficient to warrant a conviction.

COCKBURN, C. J.—You say that if a man erects a powder-mill in the centre of a populous neighbourhood, he may lawfully carry on his business if he does so carefully.

Parry.—Yes. If the naphtha was kept in such a way that no danger could arise, then there is no offence.

POLLOCK, C. B.—The judgment of the court is required on this point. The indictment is for merely keeping naphtha, and in order to prove it dangerous, the prosecutors give evidence of the using it with spirits of wine, but then the user is not mentioned in the indictment.

LORD CAMPBELL.—Evidence was given that did not strictly apply to the indictment, but we must suppose that the judge told the jury that they were not to regard that, but to confine their attention to the question of keeping. If the only question is, whether danger *ab extra* is to be entirely disregarded, I do not think we can have much doubt or difficulty about that. Surely the keeping twenty tons of gunpowder in Cheapside would be indictable as a nuisance.

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Parry.—No one is indictable for a nuisance, unless he does some act or is guilty of some omission by which the public sustain an injury. There must be the doing some act which it was unlawful to do, or the omission of some act that it was his duty to do, but nothing of the kind is shown here. On the contrary, it was proved that, as far as any conduct of the defendants went, they exercised the greatest care in the process of the manufacture. Is then the simple keeping of a large quantity of a combustible material an offence, merely because something *ab extra* may arise to cause danger to the public? The facts in *R. v. Taylor* are not stated, and cannot now be ascertained; it may well be that in that case some act of the defendant in the keeping caused the danger. There is, otherwise, no express authority on this point; but in 3 Atkyns, 750, Ca. 288, it is laid down that the fears of mankind, though reasonable, would not be sufficient to create a nuisance. The existence of such fears here is the only ground on which the argument for the prosecution can be sustained. The case in 3 Atkyns, was an application before Lord Hardwicke for an injunction. Danger *ab extra*, as the groundwork for a charge of nuisance, is like a prohibition *quia timet*, which that case decides will not lie. If this is held to be an indictable offence, where is the line to be drawn? Spirits of wine is highly inflammable, but is a distiller to be indicted because a fire happening near his premises might reach them and cause danger to the neighbourhood? Hatters use large quantities of alcohol. Dealers in pitch, tar, and turpentine would be precluded from having any stock of these articles on their premises. The fact that several acts of Parliament have been passed to prevent the keeping of gunpowder in large quantities is an argument in favour of the defendants.

Wilde, Q. C., and Locke, for the prosecution.—The portion of the case relied upon is that which commences with the words: "The wood naphtha was kept," and down to the words "very disastrous consequences to the neighbourhood." And the question is, whether the keeping and storing in large quantities of an article so inflammable that it can scarcely when ignited be quenched with water, is not a nuisance at common law? Surely it is *ad commune nocumentum*. In *R. v. Taylor* it was held, that keeping a large quantity of gunpowder in a populous place was a nuisance.

Lord CAMPBELL.—All that the court there decides is that the question is a proper one to be left to a jury.

Wilde.—Just so; but at all events it decides that such conduct may constitute a nuisance if the jury think it one. In *R. v. Williams* (1 Russ. 321), this point was decided. That there have been statutory regulations controlling the keeping of gunpowder near to populous places is no argument in favour of the defendants. They were passed to give increased protection to the public. No doubt there has been here no proof of negligence in the use of the material, but still the keeping it under such circumstances that the merest accident, either from within or from without, might

in and destruction around, is sufficient to constitute an As to there being danger merely *ab extra*, take the case as house by the side of a public thoroughfare, and which taken down by the vibration caused by vehicles passing d. No one doubts that the owner would be liable for a and yet the danger there is entirely *ab extra*.

CAMPBELL.—The danger must be of something that will bably occur, but it seems to me to be immaterial whether injury is caused within or from without.

—In *R. v. Vantandillo* (4 M. & S. 75), the carrying a child with the smallpox through the public streets was held to ictable nuisance. There the fear and the danger arising act made it indictable. In *R. v. Brookes* (Tremaine, P. L. precedent cited would equally apply to such a case as that is meant by the statement in 3 Atkyns is, that if self is not a nuisance, the fears of mankind will not make

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URN, C. J.—No doubt. If there is no real danger the mankind will not make the act a nuisance; but the ques- there real danger?

CAMPBELL.—In the case cited from Tremaine, it was the hat caused the annoyance, there was an absolute evil ly existing.

—Reasonable fear of injury to life and property is an isting annoyance.

URN, C. J.—It is said that this material has always been a great care. That may have been so; but what man r for the care and prudence of his servants?

—What is an indictable nuisance is laid down in 1 Hawk.

as, J., referred to *Crowder v. Tinkler* (19 Ves. 621).

in reply.—To hold this to be a nuisance would be to put numerous manufacturing establishments throughout the

The argument on the other side simply amounts to and so come to pass some injury will arise, but at pre- jury has been sustained by any one. Making fireworks was not indictable before the statute.

CAMPBELL.—I am not at all satisfied of that. On the con- ink that where they were made in sufficient quantities danger, the maker would have been indictable at com-

J.—Take it that at present the business is carried on e free from any danger; but then the act of a wrongdoer ment would cause the immediate destruction of property ps of life.

rned judges took time to consider their judgment, which red on the 30th of May.

JUDGMENT.

CAMPBELL, C. J.—We are unanimously of opinion that

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the conviction in this case ought to be affirmed, with the exception of the Lord Chief Baron, who assents to the doctrine of law propounded in the judgment, but he does not concur in the result. The defendants' counsel began by objecting to the first count of the indictment on which the conviction took place, but we do not entertain any doubt of its sufficiency. It alleges that the defendants unlawfully, knowingly, and wilfully did deposit in a warehouse belonging to them near to divers streets and highways, and to divers dwelling-houses of Her Majesty's subjects, divers large and excessive quantities of a dangerous, ignitable and explosive fluid called wood naphtha, and did keep in the said warehouse and near to the said streets, highways, and dwelling-houses the said fluid in such large and excessive quantities, whereby the Queen's subjects passing along the said streets and highways, and residing in the said dwelling-houses, were in great danger of their lives and property, and were kept in great alarm and terror *ad commune nocumentum*, &c. The indictment certainly does not state that any noxious effluvia issued from the naphtha, that the air was corrupted by it, or that any bodily harm was done by it to any of the Queen's subjects; but we conceive that to deposit and keep such a substance in such quantities in a warehouse so situated, to the danger of the lives and property of the Queen's subjects, is an indictable offence. The law of the country would surely be very defective if life and property could be so exposed to danger by the act of another with impunity. There is no ground for saying that, according to the doctrine contended for by the defendants' counsel, neither brandy nor wine, nor any ignitable substance, could be kept in the cellar of a town house without the owner of the house being liable to fine and imprisonment. The substance must be of such a nature, and kept in such large quantities and under such local circumstances, as to create real danger to life and property. The well-founded apprehension of danger which would alarm men of steady nerves and reasonable courage passing through the street in which the house stands, or residing in adjoining houses, is enough to show that something has been done which the law ought to prevent by pronouncing it to be a misdemeanor. Accordingly, to manufacture or to keep in large quantities, in towns or closely inhabited places, gunpowder, which for this purpose cannot be distinguished from naphtha, is, by the common law of England, a nuisance and an indictable offence. This doctrine is to be found in almost all treatises on Crown law, and it was acted upon in *Rex v. Taylor* (2 Strange, 1167), *Reg. v. Williams's case* (1 Russell, 321), and in *Crowder v. Tinkler* (19 Ves. 617). We are next to consider whether the facts found by the jury in this case were sufficient to support the indictment. The jury found that "naphtha is very inflammable, more so than spirits of wine, or even than gunpowder itself, passing into vapour at a heat of 140° of Fahrenheit, and if inflamed, water could not put out the fire arising from it, unless that water was applied in enormous proportions relatively to the quantity of inflamed naphtha; and that,

without dispute, a fire arising and commencing with the quantity kept upon these premises could not be quenched, and would produce very disastrous consequences to the neighbourhood." The jury to be sure likewise found, "that it was the practice in the warehouse never to allow any candles or fire or gaslight to enter therein, and so long as that continued the naphtha would not produce danger." These facts taken together would, we think, fully justify a verdict of guilty, although no damage was actually done by the naphtha. We cannot say that it might not have been dangerous to life and property irrespective of ignition from without. The supposed safety from within depended upon the care of the defendants' servants in not allowing any candles or fire or gaslight to enter the warehouse, and it was only so long as this care continued that the naphtha could not produce danger. With great and unintermitting care, gunpowder might be kept, and perhaps manufactured, in very large quantities without doing any damage; the law takes notice that occasional carelessness may be reckoned upon, and forbids that to be done which on the recurrence of carelessness will, in all probability, prove destructive to life and property. Therefore the simple keeping of large quantities of gunpowder in the midst of a dense population was considered to be a misdemeanor at common law. The statute 12 Geo. 3, c. 81, does not create this offence; it only punishes with heavy penalties and forfeitures the breach of certain regulations which it enacts for the safe keeping and carrying of gunpowder. We are called upon, however, by the question which the case submits to us to say, whether, when such a manufacture is carried on so carefully as, in the opinion of scientific men, to produce no danger, its liability to danger *ab extra* may make it a public nuisance. And we have no doubt that its liability to danger *ab extra* may make it a public nuisance. If the locality were in the midst of such terrific fires as blaze day and night in some coal and iron districts in this country, there might well be a danger of towns being laid in ashes by the explosion of a large accumulation of naphtha as well as of gunpowder, however carefully it might be kept by its owner in his warehouse. The naphtha stored in this warehouse in Suffolk-lane, Thames-street, in the heart of the city of London, might be exposed to ignition from various external accidents? A fire might thus arise "which could not be quenched, and would produce very disastrous consequences in the neighbourhood." Upon the trial of such indictments we consider that it is a question of fact for the jury, whether the keeping and depositing or the manufacturing of such substances really does create danger to life and property as alleged; and this must be a question of degree, depending on the circumstances of each particular case; no general rule of law can be laid down beyond this, that the substantial allegations in the indictment must be substantially proved. In the present case we think that sufficient, although not necessarily conclusive, evidence was adduced, and that although the judge would not have been justified in directing a verdict of guilty to be

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entered without taking the opinion of the jury upon it, he was fully justified in telling the jury (which he appears to have done) that if the depositing and keeping the naphtha in the manner described, coupled with its liability to ignition *ab extra*, created danger to life and property to the degree alleged, they might find a verdict of guilty. Whether the liability to ignition *ab extra* could properly be taken into consideration by the jury he reserved for our opinion, and we answer, Yes. The conviction must, therefore, be affirmed. This judgment being submitted to my Lord Chief Baron, he writes thus: "*Dissentiente*, the Chief Baron; not because he differs from the ruling of the rest of the court in point of law, but because it appears to him that the defendants were indicted merely for depositing the article in a warehouse, and were convicted upon evidence of a dangerous use of it in mixing it with another article to make a very combustible material, and he thinks there ought to be no judgment against the defendants on this trial, but that another indictment ought to be preferred." With sincere deference to the Lord Chief Baron, I must observe, on my own part, that we have taken into consideration no evidence except evidence to support the charge in the indictment, because, although there was evidence of the manner in which that business was carried on, that was not the foundation of our judgment. We think that the evidence supported the indictment, and we rely only on the evidence of danger that arose from the manner in which it was deposited and kept in the defendants' warehouse.

Conviction affirmed.

Wilde, Q. C., and Locke for the prosecution.
Serjeant Parry for the defendants.

OXFORD CIRCUIT.

MONMOUTHSHIRE SUMMER ASSIZES.

July 2, 1857.

(Before Mr. Baron MARTIN.)

REG. v. WILLIAMS. (a)

False pretences—Note of bank which had stopped payment.

Where the prisoner, in July, 1857, gave in exchange for the sum of 5l. a promissory note for the payment of 5l. of the Old Bank, Newport, Monmouthshire, and stated that the note was a good one, though in reality the Old Bank had stopped payment in the year 1851, as the prisoner well knew, it was held that he could not be convicted of obtaining the 5l. by false pretences.

THE prisoner, John Williams, was indicted for having on the 5th of July falsely pretended to one Valentine Hughes, that a certain promissory note of the Newport Old Bank was a good and valid note (he the said John Williams well knowing that the said bank had long before stopped payment) by means of which said false pretence the said John Williams unlawfully did obtain from the said Valentine Hughes the sum of 5l., the moneys of the said Valentine Hughes, with intent to defraud.

Partridge for the prosecution.

The depositions disclosed the following facts:—The prosecutor went on the 5th of July, 1857, to a public-house where the prisoner was drinking. The prisoner said that he would pay for a gallon of beer if any one would change a 5l. note for him. The prosecutor handed over 5l. in exchange for the note, which the prisoner assured him was a good one. The note was one issued by Messrs. Williams, of the Old Bank, Newport, Monmouthshire, and was dated, "May, 1847." When taken into custody the prisoner stated that he had taken the note at Abergavenny, and had afterwards heard that the bank had stopped. The Old Bank of Newport stopped payment in October, 1851, and Messrs. Williams were made bankrupts in the same year.

MARTIN, B.—Mr. Partridge, how do you propose to make out

(a) Reported by R. SAWYER, Esq., Barrister-at-Law.

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the charge in this case? It appears to me that the prisoner cannot be convicted. Can you cite any decision in your favour?

Partridge.—There is one case upon the point, *R. v. Spencer* (3 C. & P. 420), where the prisoner was indicted for falsely pretending that a note which he paid away was a good and available note at the time he so paid it away, and thereby obtaining money from the prosecutor. It was proved, in support of the charge, that the prisoner gave the note to the prosecutor in payment for meat; and a witness proved that he told the prisoner that the Leominster Bank (from which the note had issued) had stopped payment. It was also shown, on the part of the prosecution, that the banking-house at Leominster was shut up, and that Messrs. Coleman and Morris (the bankers) had become bankrupts; but it appeared on cross-examination that a third partner had not become bankrupt. Mr. Justice Gaselee held that the prisoner could not be convicted, because, as it appeared that the note might ultimately be paid, the prisoner could not be said to be guilty of a fraud in passing it away. That case differs from the present one, inasmuch as here there is no solvent partner of the bank. The whole firm were bankrupt.

MARTIN, B.—The case which you cite is against you. How can the fact of one partner being solvent make any difference? The estate might pay twenty shillings in the pound. When I read the depositions I thought that there was no offence within the statute, and my brother Bramwell, to whom I spoke upon the subject, thought so too. The officer of the court informs me that a case of the same kind was tried some time ago at Shrewsbury, and that the judge ordered an acquittal. I think that decision was correct, and I hold that the prisoner must be acquitted.

Verdict—Not Guilty.

OXFORD CIRCUIT.

BERKS SUMMER ASSIZES, 1857.

July 10.

(Before Baron BRAMWELL.)

REG. v. BLACKWELL. (a)

Insanity—Prisoner committed for trial appearing to be insane—Removal to asylum—Recognizances—Course of procedure, 3 & 4 Vict. c. 54.

A prisoner committed for trial upon a charge of murder having become insane was removed to a lunatic asylum, by virtue of a warrant under the hand of a Principal Secretary of State. The grand jury, at the assizes at which he would in due course have been tried, found a true bill against him.

Held, that the proper course was to respite the recognizances sine die.

THE prisoner, John Blackwell, was indicted for the wilful murder of Thomas Rance at Wokingham, on the 14th May, 1857.

Carrington, for the prosecution, said:—In this case the grand jury have returned a true bill for murder. The circumstances of the case are peculiar, and it is doubtful what is the proper course to be pursued. The person charged was, at the time of committing the offence, perfectly insane, and on the day previous to the murder was about to be removed to a lunatic asylum. While in confinement, he assaulted and killed the person who had the care of him. He was duly committed to the county gaol for trial, but has since been removed to a lunatic asylum, where he now is, and there is no doubt that he is not fit to take his trial. It is necessary that some order should be made by the court.

BRAMWELL, B.—There ought to be some evidence upon oath before me. Probably the governor of the gaol can give me the requisite information, and I will then make such order as may be proper.

Samuel Ferry (governor of the county gaol) was then sworn.—John Blackwell was in my custody under a warrant of committal upon a charge of murder, but he has since been removed to the

(a) Reported by R. SAWYER, Esq., Barrister-at-Law.

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Lunatic Asylum at Littlemore, by virtue of a warrant under the hand of Sir George Grey. He was insane at the time he was brought to the gaol, and also when he was removed. I produce the warrant. (b)

BRAMWELL, B.—Mr. Hempe (the Deputy Clerk of Arraigns) informs me that, under these circumstances, the proper course is to order that the recognizances be respited *sine die*. That order will therefore be made.

Recognizances respited sine die.

Carrington, for the prosecution.

(b) The warrant was as follows :—

“The Right Honourable Sir George Grey, Bart., one of Her Majesty’s Most Honourable Privy Council, and Principal Secretary of State, &c., &c., &c.

“Whereas by an act of Parliament passed in the 3rd and 4th years of Her present Majesty, intituled, *An Act for making further Provisions for the Confinement and Maintenance of Insane Prisoners*, it is enacted : ‘That if any person while imprisoned in any prison or other place of confinement, under any sentence of death, transportation, or imprisonment, or under charge of any offence, or for not finding bail for good behaviour, or to keep the peace, or to answer a criminal charge, or in consequence of any summary conviction, or order by any justice or justices of the peace, or under any than civil process, shall appear to be insane, it shall be lawful for any two justices of the peace of the county, city, borough, or place where such person is imprisoned, to inquire with the aid of two physicians or surgeons as to the insanity of such person, and if it shall be duly certified by such justices and such physicians or surgeons that such person is insane, it shall be lawful for one of Her Majesty’s Principal Secretaries of State, upon receipt of such certificate, to direct by warrant under his hand; that such person shall be removed to such county lunatic asylum, or other proper receptacle for insane persons, as the said Secretary of State may judge proper and appoint, and whereas it has been certified to me, under the hands of A. B. and C. D., two justices of the peace, and under the hands of E. F. and G. H., two surgeons, being persons authorized as aforesaid, that John Blackwell who was committed on the 13th day of January, 1857, to Reading Gaol, for trial on a charge of murder, has become insane, and whereas the Lunatic Asylum at Littlemore, near Oxford, has been recommended to me as a fit and proper receptacle for the said lunatic, and whereas it has been certified to me by two justices of the peace, that they intend to make an order upon the parish of Wokingham, in the county of Berks, in which the said lunatic has been adjudged to be settled, for the weekly maintenance of the said lunatic in a lunatic asylum, I do hereby in pursuance of the act of Parliament above recited, authorize and direct you to remove the said John Blackwell from the said gaol to the said lunatic asylum, there to remain, maintenance for the said lunatic to be provided as aforesaid, until further order shall be made herein, and for so doing this shall be your warrant.

“Given at Whitehall, 27th May, 1857.

“To the Sheriff of the County of Berks, }
and all others whom it may concern. }

“G. GREY.”

OXFORD CIRCUIT.

WORCESTER SUMMER ASSIZES, 1857.

July 17.

(Before Baron MARTIN.)

REG. v. WILLIAMS. (a)

Larceny—False pretences—Obtaining money by means of a trick.

The prisoner went into the shop of the prosecutor and purchased some tobacco, the price of which was three-halfpence, and tendered a half-crown in payment. The prosecutor's shopman put down two shillings upon the counter, while he was counting out the rest of the change in halfpence; the prisoner took up the two shillings, and pretending to throw them into the till, though in reality he only threw back one, asked for four sixpences instead of them; he received one shilling and two sixpences.

Held, upon an indictment charging him with stealing the shilling, that he could not be convicted.

THE prisoner was indicted for stealing one shilling the property of John Tippin, at Evesham.

Powell for the prosecution.

On the part of the prosecution a witness was called, who deposed as follows:—I am shopman to the prosecutor. On Friday, the 10th of July, the prisoner came to the shop; he asked for half an ounce of tobacco: I served him with it; he pitched down half-a-crown upon the counter. I put two shillings down upon the counter, and whilst I was counting the halfpence out of the drawer, which was partly open, the prisoner picked up the two shillings off the counter, and, as I thought, threw them into the till, and asked for four sixpences instead of them. I gave him one shilling and two sixpences, I also gave him fourpence halfpenny, the tobacco coming to three-halfpence. I suspected that something was wrong, but did not like to open the drawer whilst the prisoner was there, but immediately he had left the shop I counted the money in the drawer. Before the prisoner came into the shop, I had fourteen shillings and fourpence in silver in the drawer. I put the half-crown which I received from the prisoner in, which

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would make sixteen shillings and tenpence, and after taking out the two shillings for the prisoner, I ought to have had fourteen shillings and tenpence, but on counting my money I found that I had only thirteen shillings and tenpence. After he had thrown the two shillings into the drawer, as I thought, and as he drew his hand away, I saw his thumb bent close to the palm of his hand; I saw him put his hand into his pocket; this made me suspect that something was wrong.

MARTIN, B.—Mr. Powell, how do you make out that this is a larceny? If it be anything at all, it seems rather to amount to obtaining money by false pretences. The witness appears to have laid the money down upon the counter for the prisoner to take up; that amounts to a parting with the property in it, and there cannot be a conviction for larceny.

Powell.—The charge is made out, for the possession of the money was never parted with; it was only put down upon the counter for the purpose of being afterwards handed over to the prisoner, and he had no right to take it up. But even if that be not so, the prisoner ought still to be convicted, for the case comes within a class of offences which have always been held to amount to larceny. The prisoner has obtained the money by means of a trick; *R. v. Oliver* (4 Taunt. 274), is in point. That case is reported as follows:—"The prisoner having obtained a quantity of gold went to a public-house in the neighbourhood of Newcastle-upon-Tyne; William Smith, the prosecutor, who was groom to Sir James Hall, and who had about him notes belonging to his master, to a considerable amount, happened to enter the room where the prisoner was; soon afterwards the prisoner took an occasion to make a display of his gold, when a conversation respecting it ensued between the prisoner and the prosecutor; the prosecutor expressed a wish that the prisoner would oblige him by some gold in exchange for notes and silver; the gold was not to be purchased at an advanced price, but was to be taken at its legal currency. The prisoner stated, that if it would be any material accommodation to the prosecutor, and the prosecutor would do him the same kindness on a future occasion, he would let him have some gold in exchange for notes and silver; this was done to a small amount. The prisoner then observed that if it would be of any material service to the prosecutor, he could procure him a considerable further quantity of gold, if the prosecutor would lay down notes to the amount. Upon this the prosecutor paid to the prisoner 35*l.* in bank notes, which the prisoner took up, and went out promising to return immediately with the gold. The prisoner did not return, and the prosecutor never saw him again till he was apprehended. Upon these facts being proved, Wood, B., held that the case clearly did amount to larceny, if the jury believed the intention of the prisoner was to run away with the notes, and never to return with the gold; whether the prisoner had at the time the *animus furandi* was the sole point upon which the question turned." So here, the jury would be of opinion that the

prisoner went into the shop for the purpose of getting possession of the money, and if that was so he ought to be convicted.

MARTIN, B.—No; the decision in the case you refer to was quite right, but it does not apply. The case against the prisoner here is, that he pretended that he had returned the whole of the money, when in reality he had only returned one shilling. He cannot, therefore, be convicted upon this indictment, though it might be otherwise if he had been indicted for obtaining the shilling by false pretences.

Verdict—Not Guilty.

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v.
WILLIAMS.
—
1857.
—
*Larceny—
False pretences.*

OXFORD CIRCUIT.

STAFFORD SUMMER ASSIZES, 1857.

July 23.

(Before Baron MARTIN.)

REG. v. JACKSON AND ANOTHER. (a)

Murder—Prisoners charged with a joint offence—Separate trials—Common unlawful object.

Where two persons charged with murder by the same indictment had made statements implicating one another, and those statements were evidence for the prosecution, the court, upon the application of the counsel appearing for one prisoner, allowed them to have separate trials.

Where two persons go out with the common object of robbing a third person, and one of them, in pursuit of that common object, does an act which causes the death of that third person, under such circumstances as to be murder in him who does the act, it is murder in the other also.

GEORGE JACKSON, and Charles Brown were indicted for the wilful murder of William Charlesworth, on the 23rd of May, 1857, at the parish of Abbott's Bromley.

Kenealey.—It appears upon the depositions that the two prisoners have respectively made statements implicating one another as being connected with the charge which is to be inquired into. One of those statements was made by the prisoner Jackson

(a) Reported by R. SAWYER, Esq., Barrister-at-Law.

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when before the magistrates, and the other was made by the prisoner Brown to an inspector of police. They will be given in evidence on behalf of the prosecution, and will necessarily influence the minds of the jury. It is suggested, therefore, that the only way to insure a fair trial, is to try the prisoners separately, so that the statement of the one may not be in evidence before the jury upon the trial of the other.

BRAMWELL, B.—I have spoken to my brother Martin, and we think that if it is wished that the prisoners should be tried separately, it ought, under the circumstances, to be allowed.

The prisoner Jackson was then given in charge to the jury.

It was alleged by the prosecution, that on the night in question the prisoner and other persons were at a public-house, called the Coach and Horses, to which the deceased came in the course of the evening; that after the deceased had gone away, the prisoner and Charles Brown followed him for the purpose of robbing him, and that in pursuance of that object, the prisoner, or Charles Brown, or both of them, struck him on the head with a large hedge-stake, and thus caused his death. In addition to evidence which was produced to support these alleged facts, it was proved that the prisoner had, when he was before the magistrates, made the following statement, being the one first above alluded to:—"I went to the Coach and Horses on Friday night. I was looking at them bowling, and they would make me one of the bowlers, and I did so. Brown and me had a jug of ale or two. I sat against Mr. Bamford; they sat on the other side. Bamford and Charlesworth quarrelled about selling some barley. John Cresswell and Brown were making it out to go and frighten Charlesworth. Cresswell said, 'I'll go and put a jacket on that they will not know me.' Then against Fitchett's hedge, he said to me, 'You must not say anything; we shall have something to-night.' He said to me and Brown, 'Go on after him, and I will follow.' I felt very tipsy, and me and Brown went on; I was going home, and Brown says to me, 'Oh, come, come on, we shall have some money to-night.' I was so tipsy that I was persuaded. I was so tipsy that I did not know what I was doing of; I did pull that stake out of the hedge; I was going along, and Mr. Charlesworth asked me where I was going along the road. He fetched me a stroke with his stick. He said, 'I know you are after me: you want to rob me.' He up with his stick to strike me again. I got this stake and caught him at the back of the head, and knocked him down. I was sorry. After that I tumbled myself. I was so tipsy, I did not know what I was doing. I was sorry I did do it, and that was all I did at him. Brown picked his pocket, and gave me the money, and I put it into mine. He picked up the stake; whether he hit him, I cannot tell, I was so put about. I sat on the hedge; I was rather sick. Directly after, he said, 'Come on:' so we did, and went off. We went along the road across the fields. He asked me for some money, and I gave him three half-crowns. He said the other would do towards night; so we parted at that. I saw no more of

him till next day, at the Coach and Horses, Dulcimer (Cresswell) came to me, and said, 'You must not say anything.'

The jury found the prisoner *Guilty*.

Charles Brown was then given in charge to the jury. The same facts were alleged on the part of the prosecution as in the case of Jackson, and proved, except that the statement of Jackson was not put in, and it was proved in addition that the prisoner had made the following statement, being the one secondly above referred to:

"I was at the Coach and Horses. George Jackson, Dulcimer Jack (Cresswell), H. Murray, and C. Harvey were there last night, May 22nd. We were drinking one among another. Mr. Charlesworth, of Rake End, came in. Dulcimer Jack said to me and Jackson, 'We'll go and frighten Mr. Charlesworth.' We all went out together, leaving Mr. Charlesworth in the house. We all went together as far as Mr. Bannister's, about fifty yards, where Dulcimer Jack sat down on the bank; I and Jackson left him. While we were all together, I heard Mr. Charlesworth come out of the Coach and Horses. Then I and Jackson went along the road as far as the Cross of the Hand. I went on a few yards, and then I turned back again, and found Jackson and Charlesworth together talking. Jackson held the large hedge-stake, which the police have got, behind him. This was a little before two o'clock this morning. I don't know what passed between Jackson and Charlesworth. Mr. Charlesworth passed on towards his house. Jackson and I followed; Jackson said, 'Now is the time.' He then went up to him and struck him on the side of the neck with the hedge-stake he had with him. Mr. Charlesworth fell down, and when he was down Jackson struck him with the stick and kicked him on the side of the head. I did not hit or kick him at all; I did not hear him make any noise, neither did he struggle. Jackson and I then turned him on his back, he having fallen on his face. I searched one of the pockets, and Jackson the other, I took some silver out of the pocket I searched, and Jackson took out some gold, silver, and, I believe, a 5*l.* note. I gave what I found in the pocket to Jackson; all of it. We then returned towards Bromley up Broad-lane; I went with Jackson as far as Mr. Murray's middle stile. I then asked him for some money, and he gave me two half-crowns. I then wished him good night, and left him. Dulcimer Jack told us only to frighten him. When we had left Dulcimer Jack, Jackson said, 'Let us stun him, and take his money.' The above statement is the truth, and I make it voluntarily, having been cautioned by Inspector Crisp that what I might say would be taken down in writing, and might be used against me.

"CHARLES BROWN."

When before the magistrates, and after the prisoner Jackson had made his statement, the prisoner Brown stated as follows:—"I did not pick up the stake; I did not persuade him to go on with me. I picked one pocket, and he picked another. I gave him the money, and he gave me two half-crowns, and that is all."

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Evidence—
Separate trial—
Joint offence.

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Cooke Evans, in addressing the jury.—There is nothing to show that the blow which caused the death was struck by the prisoner, or that he was a confederate for the purpose of doing anything more than taking the money of the deceased. The prisoner cannot be convicted of murder, unless it is shown that the murder was committed in the prosecution of some unlawful purpose of the prisoner. Mr. Greaves in his edition of Russell on Crimes, vol. i. p. 29, after stating the general rule upon the subject, says, "But this will apply only to a case where the murder was committed in prosecution of some unlawful purpose, some common design in which the combining parties were united, and for the effecting whereof they had assembled; for, unless this shall appear, though the person giving the blow may himself be guilty of murder or manslaughter, yet the others, who came together for a different purpose, will not be involved in his guilt. Thus, where three soldiers went together to rob an orchard, two got upon a pear-tree, and the third stood at the gate with a drawn sword in his hand, and the owner's son coming by, collared the man at the gate, and asked him what business he had there, whereupon the soldier stabbed him, it was ruled to be murder in the man who stabbed, but that those on the tree were innocent:" (Forst. 353.) He cites also *R. v. Howell* (9 C. & P. 437), where the law upon the subject was laid down by Littledale, J., at great length. It is submitted that the charge is not made out against the prisoner, as it is not shown that he was at all concerned in the act which caused the death of the deceased.

BRAMWELL, B. (in summing up to the jury.)—The rule of law is this,—if two persons are engaged in the pursuit of an unlawful object, the two having the same object in view, and, in the pursuit of that common object, one of them does an act which is the cause of death, under such circumstances that it amounts to murder in him, it is murder in the other also. The cases which have been referred to by the prisoner's counsel may be explained in this way. The object for which the parties went out was comparatively a trifling one, and it is almost impossible to suppose that if one had committed a murder while engaged in the pursuit of such an object, the act could have been done in furtherance of the common object they had in view, which was comparatively so unimportant. There is evidence in the present case of the prisoner and Jackson going together with the intention of robbing Charlesworth the deceased. If you believe the statement made by the prisoner that Jackson gave the blow of which Charlesworth died, it was clearly murder in him. Then was the blow given in furtherance of the common object? It may be illustrated in this way. Suppose two men go out together, and one of them holds a third man for the purpose of enabling his companion to cut that man's throat, and his companion does so, no one could doubt that they are both equally guilty of murder. The guilt of both would be the same. Therefore I leave the case to you in this way. If you find the common unlawful object in the two prisoners, and death ensuing from the act of

Jackson in pursuance of that common unlawful object, under such circumstances that it was murder in him, it is your duty to find the prisoner guilty.

Motteram and Clay, for the prosecution.

Kenealey, for the prisoner Jackson.

Cooke Evans, for the prisoner Brown.

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Evidence—
Separate trial
—Joint offence.

Verdict—Guilty.

OXFORD CIRCUIT.

SHROPSHIRE SUMMER ASSIZES, 1857.

July 27.

(Before Baron MARTIN.)

REG. v. YATES. (a)

Costs of prosecution—Manslaughter—Right of father of deceased to prosecute—Person appearing on recognizance to prosecute—7 Geo. 4, c. 64, s. 22.

In a case of manslaughter, the father of the deceased retained an attorney to prosecute the person charged. In pursuance of this retainer, the attorney prepared and delivered briefs to counsel at the assizes, with instructions to conduct the prosecution. A constable of the county police had been bound over by recognizance to prosecute, and the solicitor for the police, in pursuance of general orders given to him by the constabulary committee, prepared and delivered a brief to counsel: Held, that the court had no power to order that the attorney who had been retained by the father should be allowed the costs of preparing briefs, &c.

THE prisoner, John Yates, was indicted for the manslaughter of Charles Elliott, at the parish of Allrighton:—

Cook Evans and Talfourd, for the prosecution.

Corbett, for the prosecution.

The prisoner had been charged before the committing magistrates with the offence above mentioned, and had been duly committed for trial. Two days after the death, the father of the deceased gave a retainer to a Mr. Hughes, an attorney, authorizing him “to prepare, present, and prosecute a bill of indict-

(a) Reported by R. SAWYER, Esq., Barrister-at Law.

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ment at the next assizes to be holden, &c.” In pursuance of this retainer, Mr. Hughes prepared briefs, and delivered them to counsel to prosecute the prisoner. He also applied to the coroner for copies of the depositions, and had paid a sum of 1*l.* 3*s.* 10*d.* for them. The magistrates who had committed the prisoner for trial had bound over a constable of the county police to prosecute, and as was usual in such cases, and in pursuance of general orders given to the solicitor of the police force, by the constabulary committee for the county, that gentleman had prepared a brief, which he had delivered to another counsel (Corbett), with instructions to conduct the prosecution.

Cook Evans.—The father of the deceased had a right to retain an attorney to prosecute, but it is suggested by the officer of the court that it is questionable whether the costs of that attorney in carrying on the prosecution can be allowed.

MARTIN, B.—It certainly appears to be satisfactory that the friends of the deceased should be allowed to prosecute if they choose to do so, and that the expenses they are put to should be allowed, but it is clear that I must allow the expenses of preparing the brief which has been delivered to Mr. Corbett.

Cook Evans.—The question turns upon the proper construction to be put upon the 7 Geo. 4, c. 64, s. 22, which enables the court to allow the costs of the prosecution. It is in these words, “and with regard to the payment of the expenses of prosecutions in cases of felony, be it enacted, that the court before which any person shall be prosecuted or tried for any felony, is hereby authorized and empowered at the request of the prosecutor, or of any other person, who shall appear on recognizance or subpoena, to prosecute or give evidence against any person accused of any felony, to order payment unto the prosecutors of the costs and expenses which such prosecutor shall incur in preparing the indictment, and also payment to the prosecutor and witnesses for the prosecution of such sums of money as to the court shall seem reasonable and sufficient to reimburse such prosecutor and witnesses, for the expenses they shall have severally incurred in attending before the examining magistrate or magistrates and the grand jury, and in otherwise carrying on such prosecution, and also to compensate them for their trouble and loss of time therein.” It is submitted, that under the powers given by this section, the expenses which Mr. Hughes has been put to in carrying on the prosecution may be allowed by the court, and also that they ought to be so allowed. The father of the deceased would appear to be the proper person to give instructions for the prosecution, and if not allowed in this case, it will amount to laying down a rule, that in no case could such expenses be allowed. Suppose this was a case of burglary, it could not be said that the person whose house was broken into ought not to be allowed to give instructions to an attorney, and thus take care that the prosecution for the offence by which he has suffered injury should be properly conducted: that is almost the same as the present case, in which the father is the person who has suffered

injury by the death of his child, and who is most interested in the prosecution. The rule, which appears to have been made by the magistrates of the county, cannot be binding upon the judge at the assizes, however proper such a rule may be. It may be that "the prosecutor" is one person, and the person "who shall appear on recognizance to prosecute" is another. The coroner has recognized Mr. Hughes as being the attorney for the prosecution. It is therefore submitted that the costs should be allowed.

MARTIN, B. (after consulting with BRAMWELL, B.)—The question is, whether I can allow a double set of costs, and I am of opinion that I have no power to do so. The person who is bound over to prosecute is really the prosecutor, and is obliged to appear. It is not the same as a case of burglary, for the person whose house is broken into is interested in the prosecution, but here the person interested is dead. The coroner has only recognized Mr. Hughes as the attorney for the prosecution, by sending to him copies of the depositions. I am of opinion that I have no power to order that these costs should be allowed, and my brother Bramwell agrees with me.

Costs disallowed.

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COURT OF CRIMINAL APPEAL.

November 21.

(Before COCKBURN, C.J., ERLE, WILLIAMS and CROMPTON, J.J., and CHANNELL, B.

REG. v. WATSON. (a)

*False Pretences—Prosecutor induced to enter into partnership and to advance money as part of the capital of the concern.**Upon the trial of an indictment for obtaining money by false pretences, it was proved that the prosecutor, upon the faith of certain representations made to him by the prisoner, entered into a partnership with him and advanced money as part of the capital of the firm :**Held, that under these circumstances, a conviction could not be sustained.*

AT the Midsummer Sessions held at Bury St. Edmunds in July, 1857, Robert Watson and Mary his wife were indicted for obtaining money under false pretences, upon the indictment, a copy of which is hereunto annexed.

The female prisoner was acquitted during the trial; the male prisoner was convicted upon the three first counts of the indictment, and sentenced to be imprisoned to hard labour in the House of Correction at Bury St. Edmunds for six calendar months, but upon application on behalf of the prisoner for a case for the decision of the Court of Criminal Appeal, upon the ground that it was a matter which ought to have been decided by a civil action, and not to have been made the subject of a criminal prosecution, the court respited the judgment, upon the defendant finding bail himself in 100*l.*, and two sureties in 100*l.* each, upon condition that he appear and render himself when called upon.

The evidence upon which the jury were called upon to decide, as entered in the chairman's notes, was as follows :

Joseph Irving : I am a clergyman of the Church of England and prosecutor. On January 31, I saw an advertisement in the *Times*. "Partnership. Wanted, a partner who can command a moderate amount of capital, to join an established mercantile business in the country, of gentlemanly character. No one need apply who

cannot give first-class references, as the respectability of the party is more the object of the party than capital. Address, post paid, to 'Beta,' Post Office, Colchester, Essex." I answered it, and requested particulars of the partnership to be directed to "Dr. Irving, Hill-road, St. John's Wood, London." February 3, 1857, I received a letter from Watson.

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"Wiston House, Wiston,
Suffolk, Feb. 3, 1857.

"Sir,—I received your letter in answer to my advertisement, addressed to 'Beta,' Post Office, Colchester. My business is that of a country merchant, and my object is to receive a gentleman into my business who will unite with me in the general duties of the same and coincide in the management, &c. &c., which is conducted without risk; my connexion very old established, and the profits very considerable and done principally for cash. My customers are amongst the first farmers in the county. I make large sales in linseed and rape cakes, &c. &c., for agricultural purposes, and do considerably with two of the first breweries in London in stout and porter, which I supply wholesale to private families. The calling is considered gentlemanly and not of a sedentary character, the principal part of my time being occupied in riding round amongst my connexion and in attending different markets, where I make sales and receive my assets. And now as to capital; I am in excellent credit and have ample capital to conduct my business: therefore the amount that you can command will only be a secondary consideration if we can agree on the other points, but I hope you will not hesitate to state what amount you have at liberty. I think we cannot fully understand each other without an interview, and as it is probable I shall be in London within a week or ten days, if you think further of the matter, I propose that you shall call upon me at the Four Swans Hotel, Bishopsgate Street, London; this will give us both an opportunity of judging as to the probability of a partnership. I will let you know upon what day upon hearing from you again.

"I am, Sir,

"Yours most obediently,

"R. WATSON."

I went to the Four Swans on February 13th, about eleven in the morning; Watson was there. He stated he had an order from Hoare's to make as much malt as he could for them. Messrs. Hoare were large brewers in London. The contract was worth 2000*l.* a year at least. He said he had ample capital to carry on the business, and his credit was as good as any man could have. He said he did not want the money to carry on the business, he had plenty of capital, but he wished my money to give me an interest in the business. He said the profit was 4*s.* per quarter. He asked what amount of capital I had; I said 500*l.*, and that if the business was as he stated I had no objection to advance 500*l.* or 1000*l.* more. He also stated he had a porter business, the particulars of which he would give me at Wiston. I made an appointment to go on the 17th.

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Mrs. Watson was present at the latter part of the conversation : she said they had the malting with the Messrs. Hoare, and also a large porter business. I went to Wiston House, Nayland, on the 17th; on the morning of the 18th, Watson took out a letter which he said was from Hoare's, about the contract to make malt; that it contained the terms he had told me in London. Mrs. Watson was in the room. He produced a sample of malt which he said was what he was making at the Hythe, Colchester. He said he was going to buy a large quantity of wood for his malting at Hythe; that he had heard Mr. Robinson had wood to sell at Hadleigh, which would cost 500*l.* at least, and that he intended to buy it; that he was looking out for two or three maltings, and was going to ask his friend Postans to get them.

Average sales from thirty or forty barrels per week. Calculate two-thirds for the family trade, and one-third for the hotel keepers. For the family trade, twenty barrels or forty kilderkins.

	£	s.	d.
Forty kilderkins at a profit of 9 <i>s.</i> per kilderkin .	18	0	0
Ten barrels at a profit of 5 <i>s.</i> per barrel .	2	10	0
	<hr/>		
	£20	10	0
Average sales in oil cake amount to ten tons per week.			
Average profit, 1 <i>l.</i> per ton.			
Profit on ten tons	10	0	0
Profit on porter	20	10	0
	<hr/>		
	£30	10	0

Watson was not in the room when this paper was given me, but came in immediately. The money passed before Mrs. Watson gave me this. I believed the representations made by both the defendants. I paid 20*l.* because I really believed the contract with Messrs. Hoare was true. This was my sole reason. Mrs. Watson gave me the agreement, I saw her write it. It was not stamped then; I paid the 20*l.* before that agreement was written. Watson was in and out. He gave no directions; we both signed it.

"Memorandum of Agreement made this 18th day of Feb., 1857, between Joseph Irving, Hill Road, St. John's Wood, London, and R. Watson, Merchant, Wiston, Suffolk. It is now agreed, that in consideration of R. Watson admitting J. Irving into his business, and giving him one-half share of the profits of the same, Joseph Irving will advance the sum of 500*l.*: 20*l.* to be paid on the signing of this agreement, and a further sum of 380*l.* to be paid within four days from the signing of this agreement, and a further sum of 100*l.* to be paid on the 25th of March next. And it is also clearly and distinctly understood that the said R. Watson and J. Irving will give their whole time and attention to promote the interest and general benefit of the same.

"Signed this 18th day of Feb., 1857.

"R. WATSON.

"Witness, MARY WATSON.

"J. IRVING."

I parted with my money on the faith of these representations.

I bought a house at Stratford, seven miles from Nayland. I should not have bought it but from their representations; I never went to live there. I was backwards and forwards to London till May 16. On the 7th of May, Watson repeated that the profits were very large. I never could get sight of the books, nor did I ever get any money. There was very little business carried on. I bought the house of Postans. May the 15th was the first day I had any idea the business was a rotten concern. I went to Harris with Postans. Watson told me he dealt with Harris for oil cake. May 16th: Went to Watson's house; I, Postans, and Robinson saw Watson; first Watson stated he would not say anything except in the presence of his solicitor. He said he had no capital; he had credit and he considered that capital. He said his porter trade was a very good one and he did a great deal of business. He shortly after went away. He did not return for some hours; we waited, Mrs. Watson begged us to wait.

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Mr. Robinson said she must be careful what she said, as both she and her husband had rendered themselves liable to a criminal prosecution; she said she was very sorry for the part she had taken in it, that they had both duped me, and there was very little business; that only 50*l.* of porter had been bought since the beginning of the year; that Watson kept no books and had none, and that any entries that were made of the business were made by herself. She said, over and over again, could there not be some arrangement entered into. When Watson came back she said for what he had done he ought to go down on his knees and beg my pardon. Watson said, "I do beg his pardon."

Cross-examined, for Watson.—The money I paid was my own dividend from the British Bank. A clergyman twenty years; no preferment. I am married; never answered advertisements before. I assumed the name of Dr. Irving, as the advertiser assumed that of "Beta." It was four or five weeks before I told Watson I was a clergyman. I passed as Mr. Irving. A considerable time after I was introduced to Postans as Watson's partner at my request. My attention was not called to any particular business (Letter, Feb. 3). A merchant's business; nothing about malting. Watson stated at the Four Swans the profit was 2000*l.* a year. I did suppose I was to receive 1000*l.* a year for the payment of 500*l.* He said he wanted my money to give me an interest in the business. It was to be at his bankers to add to his other capital. I paid the 500*l.* to give me an interest in the business. I would have nothing to do with selling the porter; my business was with the malting; but I was to receive the profits; I knew nothing of making malt; I was to superintend generally. I was to receive 1000*l.*; so he said, and so I believed it. I was on friendly terms with the Watsons; went out together. I was never allowed to go by myself or I should have found out there were no maltings. In February I made inquiries: Watson said he had finished malting and sold his malt; he told me there would be a good deal made; I did not ascertain because I never doubted his word. At

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partnership.*

Watson's request I bought a house, 1400*l.*; it is not paid for; have been offered 100*l.* more than I gave for it. I don't know Harrison; I have written to him; first, shortly after May 7th. I expected the profits would be divided in August, and would be considerable. I expected an appointment to a Grammar-school at Wisbeach; I did not accept it. I expected Harrison to give me 300*l.* making 800*l.*; when I knew the thing was not as represented, I withdrew my letter; I would not deceive any man. When the sample of malt was produced Watson first said it was made by himself, then he said it was made by Brown of Nayland. He never gave me the letter but appeared to read from it. I did not ask for it; I believed what he said.

Cross-examined for Mary Watson.—I wrote on the same day, January 31st; eighteen days after concluded the bargain; I paid 500*l.* in expectation of receiving 1000*l.* a year by half yearly payments; I was to get 500*l.* back in six months, and then 1000*l.* a year. I was ready to do anything; I did nothing. I spent two months backwards and forwards, I offered to do anything in the office, to write letters; I bought a gig to go about. Always at Watson's house, never made any compensation to Watson. Watson told me they malted all the year, I learned they did not malt in hot weather. Did not ask to look at the books before I entered the partnership. The malting was my temptation; porter of secondary importance. I went to the house about mid-day; it was cold; did not go out on the 17th February; conversation began by Watson producing the letter from Hoare's; I did not say I am perfectly satisfied, I said I would enter the partnership; I asked if money was usual to pass? He said, yes. I handed 20*l.*; I did not pay the 100*l.* till April 27. Not any suspicion crossed my mind till after May 7th; wrote to Harrison 8th or 9th of May; slept at Watson's, May 16th; brought back Postans and Robinson; did not part with Mrs. Watson on friendly terms. We wanted Watson to prove there really was a business; I did not state I had any criminal charge against him. Robinson went to Nayland; Watson was tipsy when he returned, we agreed he was not in a fit state to be spoken to; Mrs. Watson was greatly distressed, in tears. The memorandum was given to me as a finished memorandum. She did not say it should be so many barrels per month and not per week in my presence.

Re-examined.—Watson knew I was going to write to Harrison; I did write to Harrison; after May 16th I withdrew my letter. I then believed the business was worth what I asked, and believed in the statements of Watson and of Mrs. Watson. My eyes were opened on the 16th; Watson and Mary Watson both said I had been duped; I have refused to see the parties. I have a son twenty years of age, I intended the business for him; I really believed I should get the income. I paid the money to his private account as a premium.

The chairman in summing up to the jury, after reading the whole evidence and making some remarks on the testimony of the

different witnesses (*b*), told them that if they believed the account given by Irving of the matter, they would find Robert Watson guilty.

Verdict—Robert Watson, Guilty on the first, second, and third counts, and Not Guilty on the fourth and fifth.

Sentence—Six calendar months' hard labour. Judgment respited, on defendant finding sureties, himself in 100*l.* and two sureties in 100*l.* each, conditioned to appear and render himself when called upon.

A verdict of Not Guilty was taken against Mary Watson.

The indictment was annexed to the case as part of it.

The first count alleged that Robert Watson and Mary Watson, &c., unlawfully, knowingly, and designedly, did falsely pretend to one Joseph Irving that he, the said Robert Watson, had entered into a contract with Messrs. Hoare, the great brewers, to make malt for them by commission at a profit of 4*s.* per quarter, by means of which said false pretence they, the said Robert Watson and Mary Watson, did then unlawfully obtain from the said Joseph Irving 500*l.* of the money of the said Joseph Irving with intent thereby then to defraud; whereas in truth and in fact the said Robert Watson had not entered into a contract with the said Messrs. Hoare to make malt for them by commission at a profit of 4*s.* per quarter, or any other contract whatever with the said Messrs. Hoare.

The second count alleged that the said Robert Watson and Mary Watson, unlawfully, knowingly, and designedly, did falsely pretend to the said Joseph Irving that he, the said Robert Watson, then occupied a malting-office at the Hythe, near Colchester, and that he was then making malt for Messrs. Hoare at such malting house, by means whereof, &c.; whereas in truth and in fact the said Robert Watson did not then occupy any malting-office at the Hythe, near Colchester, nor was he then making malt there or elsewhere for Messrs. Hoare.

The third count alleged that the said Robert Watson and Mary Watson, &c., unlawfully, knowingly, and designedly, did falsely pretend to the said Joseph Irving that the average sales of porter by the said Robert Watson was from thirty to forty barrels per week, on which sales there was a profit of 20*l.* 10*s.*, and that the average sales on oil cake amounted to ten tons per week, and that the average profit from such last-mentioned sales was 10*l.* per week, by means of which false pretence, &c.; whereas in truth and fact the average sales of porter by the said Robert Watson was not from thirty to forty barrels per week, nor was there on such sales a profit of 20*l.* 10*s.*, nor did the average sales in oil cake amount to ten tons per week.

Bulwer, for the prisoner.—This conviction is wrong. There is no evidence of a false pretence within the statute, nor of an obtaining of money within the statute.

(*b*) The evidence of all the witnesses was set out in the case; but that of the prosecutor, as given above, supplies all the material facts.

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COCKBURN, C.J.—According to the evidence, it seems that the prosecutor was induced to part with his money by a connected series of misrepresentations made to him by the prisoner; but in the indictment there is no one count setting out all the misrepresentations, and alleging that the money was obtained thereby. Instead of that, the various misrepresentations are separated and distributed over the different counts of the indictment; so that it is very material for us to know how the chairman left the case to the jury, and whether he directed them to consider whether each of the false pretences, charged in a separate count of the indictment, was in itself a material ingredient in the inducement which caused the prosecutor to part with his money.

Bulwer.—The chairman only told the jury that if they believed the witnesses for the prosecution, they must find the prisoner guilty.

Dasent (*amicus curiæ*, who had been counsel for the prosecution at the trial) stated that the substantial inducement to the prosecutor appeared to have been the statement of the contract with Messrs. Hoare.

Bulwer.—It may be assumed that the chairman told the jury that there was evidence for them as applicable to each count separately; but assuming that, and supposing the false pretence to be confined to the statement that the prisoner had entered into a contract with Messrs. Hoare for malt, still no offence was proved, because the result of it was only this, that the prosecutor was induced to enter into a partnership. He signed a partnership agreement and advanced 500*l.* to the firm. He did not part with that money absolutely, but retained a joint interest in it as a partner.

CROMPTON, J.—If the partnership was a mere pretence, fraudulently employed for the purpose of getting the prosecutor's money, that would not exonerate the defendant from this charge, and there seems to have been evidence for the jury that it was so in this case. But then the jury ought to have been asked the question whether there was any reality at all in the proposal of a partnership, or whether the defendant had only been guilty of exaggerating the profits of his business.

Bulwer.—If there was a *bonâ fide* business actually being carried on, a mere false statement as to the extent of it, would not be a false pretence within the statute.

CROMPTON, J.—I certainly should be loth to hold that a mere exaggeration of the profits of his business would render a man criminally responsible under the statute.

Bulwer.—The distinction is pointed out by Pollock, C.B., in *R. v. Sherwood*, 7 Cox Crim. Cas. 275.

COCKBURN, C.J.—Unless the transaction was altogether colourable, so that there was really no partnership, the conviction can hardly be sustained; for if there was a partnership there was no parting with the property by the prosecutor. The 500*l.* became the property of the firm.

Dasent mentioned that the prosecutor's case was that the money was paid to the prisoner as his own.

Bulwer referred to two letters proved at the trial, but not set out

in the case, containing statements by the prosecutor that he had entered into partnership with the prisoner and offering to dispose of his share in the business.

COCKBURN, C.J.—The question here is whether the jury, believing the evidence of the prosecutor to be true, were bound to find a verdict for the Crown; and we are of opinion that they were not, and that, consequently, the verdict cannot stand. It appears that the prosecutor, on certain representations being made to him as to the state of the business which the defendant was then carrying on, and as to the customers with whom he was dealing, was induced to advance 500*l.* as part of the property of the concern, and upon that advance to enter into partnership with the prisoner. I am far from saying that when a person is induced by misrepresentations absolutely false to part with his money, even though upon a contract of partnership, such contract would be binding upon him, and that he might not rescind it, or that there might not be ground, under some circumstances, for indicting under the statute against false pretences; but I am clearly of opinion that where he enters into the partnership and does not rescind the contract, but on the faith of the representations advances money to be part of the partnership capital, he does not part with his money within the meaning of that statute, because he is jointly interested in the partnership capital, and, consequently, in the money so advanced. Whether Mr. Irving might have rescinded the agreement, on the ground of the falsehood of the representations, is a different question. He treated it throughout as a partnership, and, instead of repudiating it, offered to dispose of his interest to a third person. This being so, the case is not within the statute.

ERLE, J.—I concur in this judgment, and upon the grounds which have been already stated. We are bound upon the statement contained in this case to assume that there was a real partnership entered into between the prosecutor and the prisoner; and that the money was advanced by one partner as part of the capital of the firm and to become the joint property of both partners. Now I am not aware of any case which decides that such a transaction is within the statute upon which this indictment is framed; and according to my notion of the law applicable to such a case it is not within it. At the same time I wish to guard myself against the supposition of holding that any one can by setting up a mere pretence of a partnership protect himself from punishment for his fraud. If the jury are satisfied that the suggestion of a partnership is a mere fiction and pretence, he may be found guilty under this statute, the proposal of the partnership being itself one of the false pretences; but, on the other hand, it would not be a proper case for conviction if the alleged false pretence consists in an exaggeration only of the prosperity of a business, inducing another to advance money as a partner in the firm. I am aware of the difficulty of drawing a definite line in these cases, and am also very sensible of the extreme importance of having definite lines drawn to mark the boundaries of criminal offences; but it is enough for

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the purpose of this case to say that that which is a mere exaggeration of profits is not within the line.

WILLIAMS, J.—From the mode in which this case is stated, I do not see how we can set aside the conviction on the ground of misdirection, no point of law being reserved for our consideration upon the direction of the chairman. The only point raised seems to be whether, upon the evidence set out, taking any view of it, the conviction might be supported, but that is not the way in which I think we ought to look at the case. On the contrary, if the evidence is capable of being regarded in a light which would entitle the defendant to an acquittal, and the jury have not negatived that view of it, we ought not to affirm the conviction. This evidence is, I think, capable of being regarded in that light; and it might also be regarded in a light that would warrant a conviction, but as these questions were not put to the jury the conviction must be quashed.

CROMPTON, J.—The only question is, whether the chairman was right in directing the jury that if they believed Mr. Irving, the prosecutor, the prisoner must necessarily be found guilty. I am far from saying that the evidence might not have raised a case for the prosecution to be submitted to the jury; but the question is, whether the jury ever had their attention drawn to consider the question what was the real inducement to the prosecutor to part with his money. There were many points for consideration in the case. The jury might think that there was no real trade, and that the offer of a partnership was a mere pretence. On the other hand, the facts were capable of the more favourable construction that there was a real business, and that the prisoner only indulged in exaggerated praise of what he was disposing of; and my impression is that a misrepresentation of the profits of a business, if there is really something to sell, is not within the statute. That, however, is one question amongst several, which ought to have been submitted to the jury; and the insufficiency of the direction, in this respect, is the only point of law which is raised by the case.

CHANNELL, B.—I also think that there were certain points which ought to have been submitted to the jury and were not. There was at least some evidence of the existence of a partnership. Watson certainly could not have denied it, and though Irving might probably have repudiated the contract, he does not appear to have done so, but to some extent to have ratified it. Then, assuming the partnership to have existed, was the money obtained from the prosecutor for the prisoner alone, or as part of the capital of the firm? All that the jury were told was, that if they believed Irving they must convict the prisoner; but that was not necessarily so, and I think, therefore, that this verdict ought not to stand.

Conviction quashed.

COURT OF CRIMINAL APPEAL.

November 21, 1857.

(Before COCKBURN, C.J., ERLE, WILLIAMS and CROMPTON, J.J.,
and CHANNELL, B.)

REG. v. POOLE AND YEATES. (a)

*Larceny—Intention to deprive the owner of his property—Fraudulent removal of articles in order to obtain payment as for work done upon them.**In order to constitute larceny, the taking must be with intention to vest the property in the thief; and, therefore, where servants employed by a glovemaker in finishing gloves, removed a quantity of finished gloves from one part of the master's premises to another, with intent fraudulently to obtain payment for them as for so many gloves finished by them:**Held, that they were not guilty of larceny.*

THE defendants were convicted before Bramwell, B., at the assizes for the city of Worcester, of stealing from their master.

The master was a glovemaker; the defendants were in his employ as glove finishers. When they had done any work the practice was to take the finished gloves to an upper room, and lay them on a table in order that the workmen might be paid according to the number finished. The defendants broke open a store-room in the premises of the master, took a quantity of finished gloves out and laid them on the table in the upper room, also part of the same premises, with intent fraudulently to obtain payment for them as for so many gloves finished by them. The gloves were never off the master's premises. Doubting the sufficiency of this evidence, the learned judge reserved the point, and ordered the prisoners to be bailed on finding sureties: (see *R. v. Holloway*, 3 Cox Crim. Cas. 242.)

E. V. Richards, for the prosecution.—*R. v. Holloway* (3 Cox Crim. Cas. 242) is certainly not distinguishable from this case; but both Bramwell and Martin, BB., doubted very much whether

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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that case could be supported, and certainly the distinction, between that case and *R. v. Hall* (3 Cox Crim. Cas. 245), where the offence was held to be larceny, is very slight.

ERLE, J.—The distinction between the two is sufficiently clear. The test is, whether the person who takes the property assumes to exercise dominion over it as owner. In *R. v. Hall*, the offer to sell the property to the owner was one of the strongest acts of dominion.

WILLIAMS, J.—I recollect that there was a similar case with respect to mining, where one miner removed a heap of ore which a fellow miner had gotten, for the purpose of obtaining payment for the supposed labour in getting it.

E. V. Richards.—That was the case of *R. v. Webb* (1 Moo. C. C. 431).

ERLE, J.—It was held not to be larceny, and a statute was consequently passed to prevent the practice. In larceny, there must be an intent to vest the property in the thief by wrong.

Richards.—In *R. v. Holloway*, it is said that the intention must be *permanently* to deprive the owner of the property, but it is a dangerous doctrine that an intention to return it will excuse the taking. Here, however, it is returned to the owner subject to a lien.

COCKBURN, C.J.—There is no lien. It is only a method of regulating and paying the servants' wages.

CROMPTON, J.—If they got a lien, the case might be different; but upon the facts, as stated, the offence seems to be that of obtaining money by false pretences.

Richards.—No money was in fact obtained; but the prisoners might probably have been convicted of attempting to obtain it.

COCKBURN, C.J.—*R. v. Holloway* is expressly in point, and was decided, I think, upon right grounds.

ERLE, J.—It is certainly important that offences should be accurately defined, and *R. v. Holloway* has defined the *animus furandi* to mean an intention to vest the property in the thief by wrong, and, consequently, to divest the real owner of it.

WILLIAMS, J., concurred.

CROMPTON, J.—I confess that I am not so clear about the principle of this decision; and if it had been a new case I should have been disposed to think that there was enough here to make out the *lucri causâ*; but the matter is concluded by authority.

Conviction quashed.

COURT OF CRIMINAL APPEAL.

November 30, 1857.

(Before COCKBURN, C.J., ERLE, WILLIAMS and CROMPTON, JJ.,
and CHANNELL, B.)

REG. v. CASTLE. (a)

*Stat. 9 & 10 Vict. c. 95, s. 57—Delivery of paper “purporting” to
be County Court process—Notice to produce.*

*A document appearing on the face of it to be a mere notice by a plaintiff
to a defendant to produce accounts on the trial of a cause, though
headed “In the County Court of L.,” and entitled as if in a cause in
that court, does not “purport” to be any process of the County Court,
and will not support an indictment so alleging it.*

THE following case was reserved by the Leicestershire Court of
Quarter Sessions.

At the General Quarter Sessions of the Peace holden for the
county of Leicester, on the 19th day of October, 1857, William
Castle was indicted under the 9 & 10 Vict. c. 95, s. 57, for that he,
on the 12th day of September, 1857, feloniously caused to be
delivered to Thomas Charles a certain paper falsely purporting to be
a copy of a certain process of the County Court of Leicestershire,
holden at Melton Mowbray, in the county of Leicestershire,
he, the said William Castle, well knowing the same to be false,
against the form of the statute in such case made and provided,
and against the peace of our said Lady the Queen, her crown and
dignity; and was found guilty, subject to the following

CASE.

There were several other counts on which the prisoner was
acquitted.

The paper mentioned in the indictment is annexed to this case
and marked A, and is to form part of it.

It was proved by Ann Charles, the wife of the prosecutor, and

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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by Caroline Charles, her daughter, who read to her the document and the direction, &c., of the envelope in which it came (she herself being unable to read), that she was indebted to the prisoner, who resided at Melton Mowbray, in the county of Leicester, for three boxes of pills amounting to 9s., but that the prisoner had in fact, previously to her receipt of the letter, alleged that the sum of 3s. 5½d., as stated in the margin of the document, was the correct balance, after deducting 3s. admitted by him to have been paid.

That in the early part of September she received by post, at Welby, in the county of Lincoln, an envelope bearing the postmarks of Melton and Grantham, which was the due course of post to her residence, the direction of which was in the prisoner's handwriting as was also the document already set out and which was enclosed, that she made inquiries in about a fortnight and found it was not a court paper.

Mr. Campion, the clerk to the County Court at Melton, gave his evidence as follows: I know the prisoner; he was a solicitor's clerk. I have searched my books for a plaint, "Castle, plaintiff; Charles, defendant;" there is no such plaint nor ever has been; no such plaint on 2nd September, and none since. This process resembles a process issued by us; it is called a summons to witness to produce books, &c.; it is the same as that mentioned in the act as summons to witness. The balance is never inserted in the summons, there is no cause for it. If there had been such a plaint the sum would have been named. The words at the foot of the document "by the Plt.," mean plaintiff.

Cross-examined.—I am also clerk to justices; when Mrs. Charles produced the document I knew it was not a summons from court. Mrs. Charles sent the document to me by letter; upon that I opened it and laid it before the justices; I said it resembles a summons to witness. A mere summons to witness does not contain the words, "You are required to appear," &c., &c. I have known a summons to go to a defendant to produce books in the case of Adcock, two years ago. It is not the usual practice for parties to give notice themselves to produce. To make a summons to witness to attend, it must have the seal of the court; I mean to say, the document produced purports to be a summons to witnesses; such a paper is always signed by the registrar; it always contains these words, "In default of your attendance," &c., &c. I mean, by purporting to be, that it resembles. The form runs in the commencement very like a true summons. I don't practice in county courts for plaintiff or defendant. In a superior court I should give, or a paper similar to that would be given, a notice to produce.

Re-examined.—I still say, it resembles a County Court process. In any court I should not give a notice to produce when no writ was issued. There was no cause in court; the notice, therefore,

was of no value. The 17th of September was a County Court day.

This was the case for the prosecution.

For the defence, William Pettit Dewes, clerk to the County Court of Ashby de la Zouch, in the same County Court district, was called and deposed as follows:—I have had ten years' experience in it. The document now produced does not resemble a summons to witnesses issued out of the court; it differs in the commencement, also in the signature; it omits the penalty in default; also the number is omitted; also there is no seal; if issued by the court it would have had a seal; the Christian names are omitted. It does resemble partly; it should say that such court is holden, &c. We seldom issue a notice to produce, they are generally issued by the parties, except an attorney is concerned. It most resembles an ordinary notice to produce.

Cross-examined.—I should infer from the document that a plaint had been pending for 17th September. The seal is wanting. I keep the seal of the court and don't let it out. A paper falsely purporting to be a copy of summons or process could not have the seal of the court.

It was then objected by the counsel for the prisoner,

First, That this particular count was bad for uncertainty (his contention as to the other counts and their proof is omitted).

Secondly, That the document in question was not proved to purport, and did not in fact purport, to be a copy of a summons for witnesses to produce, or of any other process of the County Court of Leicestershire, holden at Melton Mowbray.

Thirdly, That there was no evidence as to the actual form of the process of which the document in question was alleged to purport to be a copy, or that any like process was used in the County Court, and that the actual form in use ought to have been produced instead of oral evidence being given of its contents.

Fourthly, That there was no delivery so as to give jurisdiction to the court in Leicestershire.

I, however, declined to stop the case, and directed the jury that if they thought the prisoner had knowingly caused to be delivered this document, and had intended that the person receiving it should suppose it to be some genuine County Court process issued under the authority of the court, and should thereby be induced to pay the sum mentioned in the margin, they might find him guilty; and I have, therefore, reserved the case for the opinion of the Court of Criminal Appeal. If the court shall be of opinion that upon any of the grounds contended for, or upon my direction to the jury, the conviction was wrong, the conviction to be quashed, if otherwise affirmed: (*R. v. Evans*, 1 Dears. & Bell, 236; 7 Cox Crim. Cas. 293.)

Judgment on the conviction was postponed, and the prisoner was admitted to bail to appear and receive punishment.

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falsely
"purporting"
to be County
Court process.*

COURT OF CRIMINAL APPEAL.

November 21, 1857.

(Before COCKBURN, C.J., ERLE, WILLIAMS and CROMPTON, JJ.,
and CHANNELL, B.)

REG. v. JOHNSON. (a)

*Larceny—Property of intestate—Evidence of death before the taking—
Election to proceed in respect of particular articles.*

Upon an indictment for stealing numerous articles laid as the property of the Ordinary, the evidence was, that the articles belonged to a deceased person, that a search had been made for a will, but none found; that some small portion of the articles had been seen in the house of deceased after her death, and before her funeral; and that on the day of the funeral the prisoner took the bulk of them to the house of a witness.

Held, that there was abundant evidence that some of the articles had been stolen after the death, and that, consequently, the property was rightly laid in the Ordinary; and that the Court of Quarter Sessions had done quite right in refusing to the prosecution an election to proceed in respect of the taking of any particular articles, as there was some evidence that all were taken after the death.

AT the General Quarter Sessions of the Peace holden at the Castle of Leicester, on Monday the 19th day of October, 1857, Jane Johnson was indicted for that she, on the 17th day of September, in the year of Lord 1857, one eyeglass, one teaspoon, one hearthrug, two pieces of carpet, one flannel petticoat, three sheets, two pillowcases, one piece of bed hanging, one pot of preserved raspberries, one pair of goloshes, two brushes, one reticule, one milk-tin, one towel, one toasting-fork, one ladle, one half-pint tin, one paste tin, one tin bowl, one pair of boots, five glass bottles, one stone bottle, one door-mat, one velvet bag, one calico bag, one shawl, three pickle jars, three basins, one cullender, one puncheon, and one bible, of the goods and chattels of the Right Reverend the Lord Bishop of Peterborough, did feloniously steal, take, and carry away.

The county of Leicester is within the diocese of Peterborough. At the trial the counsel for the prisoner objected, first, that there was not sufficient evidence to go to the jury of the intestacy of

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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Frances Knight, deceased, to whom the articles stolen had belonged at the time of the decease. The evidence adduced on this point was as follows :—

Mary Ann Hincks, the wife of Richard Hincks, of Humberstone, farmer, stated that the deceased was her husband's aunt ; that she died on the 14th day of September last, and was buried on the Thursday following, September 17th ; that she made no will, and no letters of administration had been taken out ; and on further examination stated, that there had been a sale of the deceased's property by her (the witness's) husband's direction. That she believed the produce of the sale had been received by her husband, and that she and her husband had searched the whole of the drawers and boxes of the deceased, but could find no will. That they had taken every means to find a will, but no will had turned up, and witness believed that there was not one. The deceased had received money from Mr. Spooner, a lawyer in Leicester, but witness did not know whether any application had or had not been made to Mr. Spooner to ascertain if he had a will of the deceased in his possession.

Charles Oliver Clarke, a clerk to prosecutor's attorney, proved that he had searched the register of the proper local court, but no letters of administration had been taken out.

It was further objected by the counsel for the prisoner, that the property might have been stolen from the deceased before her death, and was therefore improperly laid as the property of the Bishop of Peterborough, as to which the following evidence was adduced.

The witness, Mary Ann Hincks, stated that she found three flannel petticoats after the death of the deceased, and missed one on the 17th of September (the indictment charges a larceny of one flannel petticoat), that a bag was also missed after the funeral.

Henrietta Maria Gandy, a witness, stated that the bible produced, or one like it, was in the window of the room in which the deceased died on the morning she died.

Eliza Taylor, a witness, stated that the prisoner brought a number of things to her house on the 17th of September, which were afterwards given up to the policeman.

The counsel for the prisoner asked the court if he were to confine his defence to the petticoat above mentioned, but the court determined to let the whole case go to the jury ; and the prisoner was found guilty. If the court shall be of opinion that there was no evidence to go to the jury of the intestacy of the deceased, or that there was no evidence that all or any part of the property stolen was stolen after her death, and that the property in the goods stolen, or any part of it, was improperly laid to be in the Lord Bishop of the diocese, and that therefore the conviction was wrong, the same to be quashed, otherwise to be affirmed.

Judgment on the conviction was postponed, and the prisoner was admitted to bail to appear and receive judgment.

C. G. Merewether, for the prisoner.—There was no sufficient evidence that the goods stolen were the property of the ordinary.

It does not even appear that the deceased died intestate. It is true that a witness stated that she searched for a will but found none. The search, however, was quite insufficient to justify a conclusion that there was no will. But, assuming the intestacy to be proved, how is it shown that the goods were taken after the death?

CROMPTON, J.—There is clear evidence of that with respect to one petticoat.

Merewether.—Then the judge ought to have withdrawn the case from the jury as to the other articles.

COCKBURN, C.J.—The whole value of the evidence offered was to show the time of the taking, not the particular things taken.

CROMPTON, J.—It would have been very wrong to call upon the prosecution to elect in such a case as this; because, though the evidence was more distinct as to particular articles, there was very good evidence to establish the stealing of all after the death.

Merewether.—At least the difference in the weight of evidence as to different articles should have been pointed out.

COCKBURN, C. J.—I am of opinion that this conviction is quite right. The first question was whether the property was properly laid in the bishop of the diocese. That depended upon whether the goods were stolen before or after the death of the person to whom they belonged. Now the evidence shows that the mass of them were taken by the prisoner to the house of one of the witnesses on the day of the funeral. As to some, including one of the three flannel petticoats, there is clear evidence that they were in the house on the day of the funeral, and were taken away on that day; and as to the rest, there is good evidence for the jury in the fact that all were taken to the witness's house at the same time, that they also were taken after the death. But at least as to one article the case is quite clear.

ERLE, J.—There was no foundation here for calling on the prosecutor to make any election; and I think that where there is good evidence as to certain articles charged to have been stolen, and the other articles may have been stolen at the same time, the prisoner has no right to call upon the prosecution to elect to proceed upon the former only.

WILLIAMS, J.—I am of the same opinion. It was suggested that upon further search a will might have been found: but even if a paper purporting to be a will had been found, the question would still have remained whether it was a will until it had been proved; and until probate the court could have no eyes to see the will. It is true that the probate, when granted, relates back to the time of the death; but it does not exclude the special property of the administrator in the interval. Formerly there used to be an officer *ad colligendum* appointed for the interval between the death and the probate; and there can be no doubt that the property is, in a case like this, properly laid in the ordinary.

CROMPTON, J., and CHANNELL, B., concurred.

Conviction affirmed.

REG.
v.
JOHNSON.
—
1857.

*Larceny of the
goods of an
intestate—
Property laid
in the ordinary
—Evidence.*

COURT OF CRIMINAL APPEAL.

November 14, 1857.

(Before COCKBURN, C.J., ERLE and WILLIAMS, JJ., MARTIN and CHANNELL, BB.)

REG. v. DRING AND WIFE. (a)

Receiving stolen goods—Joint indictment against husband and wife.

A husband and wife being jointly indicted for receiving stolen goods, the jury found both guilty, stating that the female prisoner received them without the control or knowledge of, and apart from, her husband, and that he afterwards adopted her receipt:

Held, that the conviction could not be sustained as against the husband.

AT the last Nottinghamshire Quarter Sessions held at Newark, William Dring and Mary Ann his wife were jointly indicted for feloniously stealing on the 22nd February last, at South Collingham, ten pecks of potatoes of the value of 7s., and two sack bags of the value of 3s., of the goods of Richard Wallhead. A second count in the indictment charged the prisoners jointly with receiving the said potatoes and sack bags, they well knowing the same to have been feloniously stolen. They both pleaded not guilty. The jury found both the prisoners guilty on the second count, and that Mary Ann Dring received the potatoes and bags without the control or knowledge of, and apart from, her husband William Dring; and that William Dring afterwards adopted his wife's receipt. The prisoner's counsel contended that this verdict amounted in law to an acquittal of both prisoners. The court thought otherwise, but deferred judgment, and discharged the prisoners on recognizance to appear at the next sessions to receive judgment, and reserved a case for the opinion of the Court of Criminal Appeal whether, under the circumstances, the verdict as against either or both of the prisoners was wrong.

Bell, for the prisoners.—The finding negatives a joint receipt; and sect. 14 of 14 & 15 Vict. c. 100, does not apply to successive

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

receipts of the same entire property. Even if it did, there is no finding in this case, that the husband did separately receive the whole or any part of the stolen property. What is meant by "adopting" is doubtful; but it cannot make the husband a joint receiver with his wife, who is found to have received without his knowledge. The conviction of the wife cannot be questioned.

No counsel appeared for the Crown.

COCKBURN, C.J.—Even if the recent statute applies to a case, where, upon a joint charge of receiving, the evidence proves two distinct successive acts of receiving the whole property stolen, we think that the facts stated in this case would not warrant a conviction. If we were to intend by the term "adopted" that he took an active part in her receipt, that might make him a receiver, but it may mean that he merely acquiesced in what his wife had done, without taking any active part so as to make him originally a receiver; and it is not necessary to give to the word the more rigid construction. So far, therefore, as he is concerned, we are of opinion that his conviction must be quashed.

Conviction quashed.

REG.
v.
DRING.
1857.

*Receiving
stolen goods—
Joint indictment
against husband
and wife.*

COURT OF CRIMINAL APPEAL.

November 14 and 30, 1857.

(Before COCKBURN, C.J., ERLE and WILLES, JJ., and
MARTIN and CHANNELL, BB.)

REG. v. ESSEX. (a)

*Embezzlement by clerk to a savings bank—Property laid in trustees—
Evidence of acting as trustee—Larceny or false pretences.*

In an indictment for embezzlement by the clerk of a savings bank, the property was laid in A. B. and others. In order to prove that A. B. was a trustee, he was called as a witness, and stated that since the commission of the offence he had been active as a trustee, but that before that date he had attended only one meeting, having been requested to do so lest there should be a deficiency of trustees; but he was also a manager, and it did not appear that any act was done at that meeting which might not have been done by a manager as well as by a trustee:

Held, insufficient evidence of acting to support the inference of a legal appointment as trustee.

Upon indictment for stealing a cheque it was proved that the prisoner being clerk to a savings bank received the cheque from a manager, upon a false representation that one of the depositors had given notice of withdrawal, and for the purpose of handing it over to the depositor. It being found that according to the usual course of business, if a depositor could not attend at the proper time to receive the cheque, it was handed to the prisoner as the agent of the depositor:

Held, that the case was one of false pretences and not larceny.

THE following cases were reserved by Erle, J.:—

FIRST CASE.

The prisoner was indicted for embezzling in 1842 money, the property of Hervey Wilmot Sitwell; and it was proved that he, in the capacity of clerk to the Rugby Savings Bank, had received and embezzled money which was the property of the trustees of the bank, under 9 Geo. 4, c. 92, s. 8. There was no rule of the society, nor any statute regulating the mode in which trustees should be appointed, or the mode in which resolutions of meetings

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

should be entered, and for the purpose of showing that Mr. Hervey Wilmot Sitwell was a trustee in 1842, the prosecutor relied upon evidence of acting as trustee; as to which Mr. Sitwell stated that from 1843 he had been active as a trustee, but before 1843 he had rarely attended meetings of trustees, and when he had so attended he signed the minute-book. The only entry found with his signature was of a meeting in 1835, and as to that meeting he stated that he had been requested by a Mr. Parker, who was acting as a trustee, to attend as a trustee lest there should be a deficiency of trustees, and that he had attended and signed the entry accordingly; that the prisoner was at that meeting, and that the heading of the page containing the resolutions was in his handwriting. Mr. Sitwell did not express by the signature that he was a trustee, or that he signed in that capacity. He did not do any act which trustees alone were capable of doing. All trustees and managers had an equal right to attend the meeting; there was nothing to show that a meeting of managers only, without any trustee, would have been invalid, and Mr. Sitwell, as rector of a parish, was *ex officio* a manager.

I held, that acting as trustee was evidence of a legal appointment, and that Mr. Sitwell's statement, if believed, was evidence of his having acted as trustee in 1835; and I directed the jury that, though it was extremely slight, it was sufficient to support the inference of a legal appointment continuing in 1842, if they made it.

The jury convicted the prisoner, who was bailed; and I reserved the question for the opinion of this court, whether there was sufficient evidence to support the direction and the conviction.

Macaulay (with him *Field*), for the prisoner.—The stat. 9 Geo. 4, c. 92, s. 8, vests the property of the savings bank in trustees; but in the original rules of the bank in 1825, Mr. Sitwell's name did not appear; and on the only occasion on which he appears to have acted, he may have acted as manager.

No counsel were instructed for the prosecution.

COCKBURN, C.J.—I think the evidence goes rather to show that he was not a trustee.

ERLE, J.—I also think the evidence insufficient to support the prosecution.

The other Judges concurred.

Conviction quashed.

REG.
v.
ERSEX.
—
1857.
—
*Evidence of
acting as
trustee.*

SECOND CASE.

The prisoner was convicted of stealing a cheque for 50*l.*, the property of Hervey Wilmot Sitwell, in 1847; and admitted to bail.

I reserved two questions for the consideration of this court.

First, was there evidence of the larceny; secondly, was there evidence of the rules of the savings bank.

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v.
ESSEX.
—
1857.

*Larceny or
false pretences.*

With respect to the first question, the evidence was that the prisoner was clerk to the Rugby Savings Bank ; that the course of business for drawing money out was this : the depositor gave a notice to the clerk of the amount required, and, if present on the next night of business, received a cheque for that amount from the manager in attendance, or, if absent, he allowed the clerk to receive such cheque and get the cash for it, to be kept by him till called for, and the depositor and clerk signed the books of account usual in a savings bank. On the 25th September, 1847, the prisoner, as clerk, falsely pretended to James Haylock, the manager in attendance, that Elizabeth Glaby, a depositor, had given notice for 50*l.*, and produced the usual entries signed by himself, and as Elizabeth Glaby was not in attendance, received from Mr. Haylock a cheque for 50*l.*, for which he afterwards obtained cash at the bank. Elizabeth Glaby had not given any notice or authority for drawing out 50*l.* or any sum, and the prisoner made the false pretence with the intention, from the beginning, of obtaining the cheque and appropriating it to his own use. In deciding this question, it must be assumed that Mr. H. W. Sitwell was trustee of the savings bank. It was objected for the prisoner that these facts showed an obtaining of the cheque by a false pretence from Mr. Haylock, and not a larceny of a cheque the property of Mr. Sitwell. I overruled it, but reserved it for this court.

With respect to the second question. A printed copy of the rules, with two names of trustees printed at the end, with a manuscript certificate of Mr. Tidd Pratt, showing his approval of the rules subjoined, was tendered, under 7 & 8 Vict. c. 83, s. 19, and 8 & 9 Vict. c. 113, s. 1.

It was objected that the copy tendered was not signed by two trustees within the meaning of those statutes, their names being printed and not in manuscript. I overruled the objection, but reserved the point.

November 14.

Macaulay (with him *Field*), for the prisoner.—First, there was no evidence of larceny ; because the manager parted with the property in the cheque to the prisoner, not as a servant of the bank but as agent of the depositor. If the representation made by the prisoner had been true, the bank would have been discharged by the payment to him. The money would have been no longer the money of the bank, nor in the hands of the prisoner as their servant. It was delivered to the prisoner on the faith of his statement that he was authorized to receive it for the depositor, it being proved that the depositors were accustomed to constitute him their agent for that purpose ; and when it was delivered to the prisoner the intention was immediately to transfer the property to Glaby. Under the rules which were produced it was clearly no part of the prisoner's duty as clerk to receive the cheques for the depositors. The rule is precise that payment is to be made to the

depositor personally; but the practice was for the depositor to forego the benefit of that rule.

COCKBURN, C. J.—Is that so? Instead of complying with the rule, a lax practice seems to have been adopted, and I doubt whether, under such circumstances, the prisoner could be legally constituted the depositor's agent. Can the money be otherwise than that of the bank until it reaches the hands of the depositor?

MACAULAY.—The question as to that is, *quo animo* it was delivered to the defendant.

WILLIAMS, J.—Had not the manager power to countermand the delivery of the cheque while it remained in the defendant's hands?

MACAULAY.—The question between Mrs. Glaby and the bank would be, whether she had authorized the defendant to receive it for her.

MARTIN, B.—Is this anything more than the case of a clerk receiving money from his principal for the purpose of paying it to a creditor?

ERLE, J.—The evidence shows that the manager did not intend to infringe the rule, but treated the defendant as the agent of the depositor, and paid the cheque to him as a payment to the depositor.

COCKBURN, C. J.—What formalities were required by the rules to be observed on the receipt of the money?

MACAULAY.—The rules are not in court; but no receipt was required beyond an entry in the depositor's pass-book; and the case states the course of business.

MARTIN, B.—I think that, assuming all that the defendant represented to have been true, the evidence does not show a payment to the depositor. The defendant was clerk to the bank, and the statement in the case cannot make him the depositor's agent. The intention of the manager seems to me immaterial in the case.

COCKBURN, C. J.—Suppose the manager had afterwards demanded the cheque from the defendant, could the latter have refused to give it up on the ground that he held as agent for the depositor?

MACAULAY.—Yes; if it were true that he had been authorized by her to receive it.

WILLIAMS, J.—That is the real question, whether the manager could not at any time before the delivery of it to the depositor have required the defendant to return it, assuming his representation to be true?

MACAULAY.—That still brings back the question with what intention the manager parted with it.

COCKBURN, C. J.—The question must certainly be discussed as if the representation had been true, and as if he had appropriated the money to his own use. Then, assuming that he had received it properly and that the manager afterwards became aware of his intention to appropriate it improperly, was it so parted with that he could not require the defendant to return it?

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v.

Exek.

1857.

Larceny or
false pretences.

REG.
v.
ESSEX.
—
1857.
—
*Larceny or
false pretences.*

MARTIN, B.—Did the right of property pass as well as the possession?

Macaulay.—That is the question; and it is submitted that the right of property would have passed, as well as the possession, if the transaction had been a genuine one. As to the second point, the copy of the rules produced did not purport to be signed by the trustees as required by 7 & 8 Vict. c. 83, s. 19.

MARTIN, B.—I should say that those produced at the trial from the custody of the trustees, and bearing the signature of Tidd Pratt, are the rules themselves, and stand on the same footing as the Parliament roll of an act of Parliament.

Macaulay.—The original rules are to be entered in a book, and copies signed by the trustees are to be forwarded to Mr. Tidd Pratt, one of which he is to send to the Commissioners for the Reduction of the National Debt, and the other to return to the savings bank. (He referred to 9 Geo. 4, c. 95, s. 1; 7 & 8 Vict. c. 83, s. 19.)

MARTIN, B.—It is his signature that makes the rules binding. They are not rules until signed by him.

Cur. adv. vult.

November 21.

This case was again mentioned, and ERLE, J. said that he would amend the case by inserting in the statement that the manager, when he handed the cheque to the prisoner, was induced by the prisoner to believe, and did believe, that he was authorized by Elizabeth Glaby to receive the cheque as her agent on her account.

COCKBURN, C. J.—We will speak to my brother Martin further about it; but when that amendment has been made in the case, the difficulty that suggested itself seems to be removed, and we shall probably feel bound to quash the conviction.

November 30.

COCKBURN, C. J. now delivered the judgment of the court.—After the amendment of the case by the learned judge, there is really no point left for argument. The prisoner must now be taken to have received the cheque as agent of the depositor, and not as the agent of his employers; and he cannot consequently be charged with stealing the money of his employers.

ERLE, J.—I was always of opinion that this was a fatal objection, but the case was tried out with a view to raising this question.

Conviction quashed.(b)

(b) It may be doubted whether the manager who gave the cheque to the prisoner had authority to part with the property in the cheque except to the depositor herself; and if not, the cases of *R. v. Longstreeth*, Ry. & M. C. C. 137; and *R. v. Robins*, 6 Cox Crim. Cas. 420; 1 Dears. C. C. 418, seem to have a bearing upon this decision.

COURT OF CRIMINAL APPEAL.

November 14, 1857.

(Before COCKBURN, C.J., ERLE and WILLIAMS, JJ., and
CHANNELL, B.)

REG. v. LIGHT. (a)

*Assault on constable in execution of duty—Arrest—Breach of the
peace.*

If a constable sees an assault committed, he may recently after that assault, and before all danger of further violence has ceased, apprehend the offender; and if in so doing he is resisted and assaulted, the person assaulting is liable to be convicted of assaulting a constable in the execution of his duty.

AT the Quarter Sessions for the western division of the county of Sussex, holden at Horsham on July 1st, 1857, George Light was tried for an assault upon George Cross, an officer of the West Sussex police, Cross being then in the due execution of his duty. The verdict was Guilty. The facts are—George Light, the defendant, is a married man, and with his wife and three children lives in a cottage at a place called Patfield, adjoining to the city of Chichester. On the night of the 11th of May last, a few minutes before 11 o'clock, the prosecutor George Cross was informed that a disturbance was going on in Patfield. He went thither and found the defendant's wife sitting under the hedge opposite to the defendant's cottage with her three children; she was crying. This was a little after eleven. Prosecutor went with her into the defendant's cottage and found defendant seated and intoxicated, but sufficiently sober to know what he was doing. Defendant's wife then, in the hearing of the defendant, stated to the prosecutor that the defendant had knocked her down and beaten her shamefully. Henry Cook, a near neighbour of defendant, was present, and he also stated to prosecutor in defendant's hearing that he had seen defendant knock his wife down and jump upon her, she being advanced in pregnancy. Henry Cook had seen the defendant do this a few minutes before 11 p.m. Defendant said nothing on hearing these statements. Prosecutor quitted the cottage, leaving the

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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1857.
—

*Assault on
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duty.*

defendant and his wife and children in it. Defendant came out immediately and closed the outside shutters, and then went inside his cottage and locked the outer door. Prosecutor remained outside and heard defendant using violent and threatening language to his wife, and saw her run out of the cottage with her children. Defendant said he would lock them out all night, and thereupon they went back again into the cottage. Prosecutor heard defendant again use very violent language, and he, the prosecutor, opened the outside shutters and he and Henry Cook (before mentioned) looked in, and both of them saw the defendant take up a shovel and hold it in a threatening attitude over his wife's head, and they heard him say at the same time, "if it was not for the bloody policeman outside I would split your head open, for 'tis you that sent for the policeman." Defendant was near enough to his wife to have struck her with the shovel at the time he raised it and spoke these words. Defendant then took off some of his clothes as if he was going to bed, and lay down on a sofa. His wife asked him to go upstairs and let her have the room below to herself. He got up and went out of the back door and she unlocked the front door. He came back immediately and said, "There, my lady, take yourself off to bed;" she replied, "I can't go upstairs in this state. I don't know one hour from another when I might be murdered." Defendant said with an oath, "I'll leave you altogether," and he then put on the clothes he had taken off, and went out. This was about twenty minutes after he had lifted the shovel over his wife's head. He went down the highway towards his father's house, which is about two hundred yards from his own cottage. Prosecutor followed him, and when defendant had walked about seventy yards from his own cottage, prosecutor took him into custody. Prosecutor had no warrant. Henry Cook (before mentioned) had been with the prosecutor all the time these things were occurring and insisted upon prosecutor taking defendant into custody, because he thought it would not be safe to let him go back to his wife that night. Defendant on being taken into custody put his hands into prosecutor's neckcloth and struggled with prosecutor, who became exhausted and fell, and the defendant got away from him. He was afterwards taken on a warrant and tried as above stated. It was objected, on behalf of the defendant, that the officer of police (George Cross) was not in the "due execution of his duty" when he arrested the defendant, inasmuch as he had no warrant; that the words spoken at the time when defendant lifted up the shovel, disproved the intention to commit an assault, and further, that the prosecutor suffered a considerable time to elapse before he took the defendant into custody, and that, when he did so, defendant was peaceably walking away in a direction from his cottage. The court overruled the objections, and the jury found the defendant Guilty. He was sentenced to imprisonment, but, with a view to the propriety of the conviction being submitted to the Court of Criminal Appeal, he was discharged on bail, in order that the judgment of that court might be taken.

The opinion of the Court of Criminal Appeal is accordingly requested on the foregoing case.

Hurst, for the prisoner.—There was no assault in the view of the constable to justify him in apprehending the prisoner. Raising the shovel would of itself have been an assault, but the words qualified the act, and showed that there was no present intention of striking: (*Turbervill v. Savage*, 1 Mod. 3; 1 Russ. on Crimes, 750.) Even if there was an assault, the constable did not then arrest; he allowed the violence to pass over; and then, when the prisoner had left the house and all intention of present violence had been abandoned, the constable interfered. At that time he was not authorized to arrest: (Stat. 14 & 15 Vict. c. 19, s. 11; *Timothy v. Simpson*, 1 Cr. M. & R. 757; Rosc. 730, were referred to.)

COCKBURN, C. J.—I am of opinion that the conviction is right. The policeman had witnessed an assault by the prisoner on his wife in the house, and when the prisoner came out, he was in such a frame of mind that the policeman might reasonably consider that he still entertained the intention of returning and using violence. The language used by the Lord Chief Baron in *R. v. Walker* (1 Dears. 358; 6 Cox Crim. Cas. 371) applies in this case, because there was continuous pursuit and recent ground for apprehending danger.

ERLE, J.—I am of the same opinion. In this case the offence had been recently committed; and, I apprehend, that a constable is not obliged to arrest upon the instant. Here he had seen an assault committed, with a threat of murder. Was it to be taken, then, that because the prisoner had come a few yards from the house the constable was bound to conclude that the wife was safe from further violence? I think he arrested him recently after the offence which he had seen committed; and that he was doing his duty in making that arrest.

WILLIAMS, J., and MARTIN and CHANNELL, BB., concurred.
Conviction affirmed.

REG.
v.
LIGHT.

1857.

*Assault on
constable in
execution of
duty.*

COURT OF CRIMINAL APPEAL.

January 23, 1858.

(Before Lord CAMPBELL, C.J., COLERIDGE and CROWDER, JJ.,
and MARTIN and WATSON, BB.)

REG. v. GODFREY. (a)

Indictment for false pretences—Obtaining a cheque—Allegation of property.

An indictment for false pretences charged that the prisoner did “unlawfully obtain from A. B. a cheque for the sum of 8l. 14s. 6d. of the moneys of C. D.”

Held, that this averment sufficiently described the cheque to be the property of C. D.

AT the General Quarter Sessions of the Peace for the county of Bedford, on the 1st day of July, A.D. 1857, the prisoner William Ansell Godfrey was tried upon an indictment containing several counts, of which the third was as follows:—

Third count.—And the jurors aforesaid, upon their oaths aforesaid do further present, that afterwards, to wit, on, &c., the said William Ansell Godfrey unlawfully, knowingly, and designedly, did falsely pretend to the said Cornelius Cox, then being the counting-house clerk of the said William Willis, that the sum of 8l. 14s. 6d. was due to the said Elizabeth Botterill from the said William Willis, for work done by the said Elizabeth Botterill for the said William Willis, by means of which false pretence the said William Ansell Godfrey did then unlawfully obtain from the said Cornelius Cox a cheque for the sum of 8l. 14s. 6d. of the moneys of the said William Willis, with intent to defraud. Whereas the said sum of 8l. 14s. 6d. was not due to the said Elizabeth Botterill from the said William Willis, for work done for him, the said William Willis; against the form of the statute in such case made and provided.

The prisoner was found guilty upon the third count of the above indictment, but the counsel for the prisoner moved in arrest of judgment, upon the ground that the allegation, “the said William

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

Ansell Godfrey did then unlawfully obtain from the said Cornelius Cox a cheque for the sum of 8*l.* 14*s.* 6*d.* of the moneys of the said William Willis," did not sufficiently describe the said cheque to be the property of the said William Willis. The court held the indictment good, but reserved the point for the Court of Criminal Appeal.

The question for the Court of Criminal Appeal is, whether the third count of the indictment sufficiently shows the ownership of the cheque alleged in such count. Judgment was postponed, and the prisoner was admitted to bail to appear at the next January sessions to receive judgment, or some final order of the court.

Metcalfe, for the prisoner.—The objection is, that the property in the cheque is not stated on the face of the indictment. The words "of the moneys of the said William Willis" cannot apply to the cheque, and do apply only to the sum mentioned of 8*l.* 14*s.* 6*d.*

LORD CAMPBELL, C. J.—May not a cheque be considered money?

Metcalfe.—No; it is neither money, nor is it a chattel of which larceny could be committed at common law. By the statute 7 & 8 Geo. 4, c. 29, it is classed amongst valuable securities.

COLERIDGE, J.—Why is it not a chattel? It is a piece of paper.

Metcalfe.—For the same reason that in *R. v. Watts* (1 Dears. C. C. 326; 6 Cox Crim. Cas. 304), an unstamped agreement was held not to be a chattel of which larceny could be committed. It is a chose in action.

COLERIDGE, J., referred to *R. v. Perry* (1 Den. C. C. 69; 1 Cox Crim. Cas. 222). (*b*)

MARTIN, B.—I should have thought that the cheque was for this purpose money; but if not, you may strike out the words "of the moneys;" and then the allegation is that he obtained the cheque of William Willis.

Metcalfe.—But this court has no power to make that amendment.

LORD CAMPBELL, C. J.—No amendment is required. The indictment may be read as if the words were not there. The conviction must be affirmed.

Tozer (for the prosecution), referred to *R. v. Radley* (1 Den. C. C. 450; 3 Cox Crim. Cas. 460), where it was held, that if money stolen be described as "of the goods and chattels" of the prosecutor, those words may be rejected as surplusage, and the indictment is sufficient.

By the Court.

Conviction affirmed.

Rex.
v.
GODFREY.

1858.

*Obtaining
cheque by false
pretences—
Allegation of
property.*

(*b*) See also *R. v. Walter Watts*, (2 Den. C. C. 14; 4 Cox Crim. Cas. 336).

COURT OF CRIMINAL APPEAL.

*January 28, 1858.**(Before Lord CAMPBELL, C.J., CROWDER and WILLES, JJ.,
and MARTIN and WATSON, BB.)*

REG. v. FRY. (a)

*False pretence—Misrepresentation of a matter of fact accompanied by a
promise.**Upon an indictment for obtaining money by false pretences, it appeared
that the prisoner had told the prosecutrix that she kept a shop at a
particular place, and that she might go home with her until she got a
situation. She then borrowed ten shillings of her and promised to
repay it when they got home ; but having got the money she left the
prosecutrix altogether. It was untrue that she kept a shop at the place
named ; and the prosecutrix stated that it was on the faith of that
representation that she parted with the money. The jury found the
prisoner guilty of fraudulently obtaining the half-sovereign, the pro-
secutrix parting with it under the belief that the prisoner kept a shop
at the place mentioned, and that she should have the money when she
went home with the prisoner.**Held, that the conviction was right.*

AT the General Quarter Sessions of the peace for the county of
Kent, holden at Maidstone on the 22nd day of October, 1857,
Mary Ann Fry was tried upon the following indictment.

Kent, } The jurors for our Lady the Queen upon their oaths
to wit. } present, that Mary Ann Fry, on the 26th day of
September, in the year of our Lord 1857, unlawfully and know-
ingly, did falsely pretend to Sarah Noble that she, the said Mary
Ann Fry, kept a shop, and that she, the said Sarah Noble, might
go and live with her, the said Mary Ann Fry, at the said shop,
until she, the said Sarah Noble, had got a situation ; and that the
husband of the said Mary Ann Fry had ordered a pair of blankets
and had not paid for them, and that she, the said Mary Ann Fry,
had not money enough to pay for them, and that she, the said
Mary Ann Fry, had got a bonnet or a cap, or some article of value,
in a bonnet box, which she wanted the said Sarah Noble to take
and keep for her. By means of which said false pretences the said
Mary Ann Fry did then unlawfully obtain from the said Sarah

Noble, certain money, to wit, the sum of ten shillings of the moneys of the said Sarah Noble, with intent to defraud. Whereas in truth and in fact the said Mary Ann Fry did not then keep a shop, and the husband of the said Mary Ann Fry had not ordered a pair of blankets, and she, the said Mary Ann Fry, had not got either a bonnet or a cap, or anything in the said bonnet box but stones and pieces of brick and dirt, as she, the said Mary Ann Fry, at the time she so falsely pretended as aforesaid well knew; against the form of the statute in such case made and provided, and against the peace of our Sovereign Lady the Queen, her crown and dignity.

The evidence, so far as it was material to the present case, was as follows:—

Sarah Noble.—On the 26th September I went to the Erith station. When I was taking my ticket the prisoner was standing near me. I dropped a half-sovereign. She picked it up and gave it to me. The prisoner got into the same carriage, and we rode together to Woolwich. I told her I was looking for a situation. The prisoner said she lived on Northumberland Heath, and kept a shop. She promised me I should go home with her until I got a situation. She asked me to go to Dartford, and I went with her. We went to the Crown and Anchor public-house, and had some refreshment there. Whilst there she told me to stop there till she came back. She came back in about twenty minutes, and had a new bonnet box and a handkerchief tied over it. She told me to hold it till she came back again. I held it; it appeared heavy, and I thought there was something in it which she had been buying. When she brought the bonnet box she said that her husband had been and got a pair of blankets, but he had not money enough to pay for them, and then asked me if I had got ten shillings. I told her I had. She said, "Would you mind lending it to me?" I said, "You are a stranger to me." She had said, "If you will lend me this ten shillings I will take you home until you get a situation." I lent her the half-sovereign, because she said she kept a shop on Northumberland Heath, and I should have it returned when I got home with her. She went away. When I found the prisoner did not come back I opened the bonnet box, and found some small pieces of stone and brick. On the 28th September I saw the prisoner, and she said she never saw me before.

Robert Carr Ebb (a police serjeant).—I went in search of the prisoner. She lives at North End, Crayford. She lodges in the house, and does not keep a shop on Northumberland Heath.

I directed the jury, if they believed the facts stated on the part of the prosecutrix, to find a special verdict. They found the prisoner guilty of fraudulently obtaining the half-sovereign, the prosecutrix parting with it under the belief that the prisoner kept a shop on Northumberland Heath, and that the prosecutrix should have it when she went home with her. As I entertained some doubts as to the legality of the conviction, I respited the judgment and

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reserved the case for the opinion of the Court of Criminal Appeal, upon the following questions:—

First. Whether the indictment sufficiently charges the prisoner with having obtained the money from the prosecutrix by means of false pretences, there being no averment that the prisoner asked the prosecutrix to lend her the money.

Second. Whether the pretence used was a sufficient false pretence within the statute.

Third. Whether the pretence charged in the indictment is sufficiently proved as laid.

No counsel appeared for the prisoner.

C. G. Addison, for the prosecution.

LORD CAMPBELL, C. J.—There is no doubt that the indictment is good enough on the face of it. The question is whether it is supported by the evidence.

Addison read the case.

LORD CAMPBELL, C. J.—The prosecutrix swears that she gave the money upon the faith of the representation that she kept a shop.

Addison.—The only question is, whether that is at all qualified by the special verdict found by the jury.

LORD CAMPBELL, C. J.—We are all of opinion that the indictment is perfectly good; and that it was supported by the evidence, inasmuch as it is found that the money was obtained by means of the false representation that the prisoner kept a shop at the place which she named.

The other Judges concurred.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

January 28, 1858.

(Before Lord CAMPBELL, C.J., CROWDER and WILLES, JJ.,
and MARTIN and WATSON, BB.)

REG. v. JENNINGS. (a)

*Conviction for simple larceny upon indictment charging larceny by a
servant—Special property.*

*Upon an indictment charging that the prisoner whilst servant to A. stole
the money of A., the proof was that he was servant to B., and that the
money which he stole was the money of B., but in the possession of A.
as the agent of B :*

Held properly convicted of simple larceny.

AT the General Quarter Sessions of the Peace for the county
of Bedford, held at Bedford on the 21st day of October,
1857, George Michael Jennings was tried on an indictment which
was in the following words:

Bedfordshire, } The jurors for our Lady the Queen upon their
to wit. } oaths present, that George Michael Jennings,
on the 25th day of September, in the year of our Lord 1857, was
servant to Edward Sanders and that the said George Michael Jen-
nings, whilst he was such servant to the said Edward Sanders as
aforesaid, to wit, on the day and year last aforesaid, certain
money, to wit, the sum of three pounds, eight shillings, of, and
belonging to the said Edward Sanders his master, feloniously did
steal, take, and carry away, against the form of the statute in such
case made and provided.

And the jurors aforesaid upon their oath aforesaid further
present, that the said George Michael Jennings, within six
calendar months from the time of committing the offence in the
first count of the indictment charged, to wit, on the 29th day of
September, in the year of our Lord 1857, being then servant to
the said Edward Sanders, feloniously did steal, take, and carry
away, certain money, to wit, the sum of 1*l.* 10*s.* 2*d.*, of, and
belonging to, the said Edward Sanders, his master, against the
form of the statute in such case made and provided.

The prisoner pleaded Not Guilty to this indictment.

At the trial it appeared that Edward Sanders was the agent of

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one Mrs. Sanders, that the prisoner was her servant at the time he took the moneys mentioned in the indictment, and that the moneys when taken were in the possession of Edward Sanders as agent of Mrs. Sanders.

Counsel for the prisoner objected that the variance between the indictment and the evidence was fatal, and that the prisoner could not be convicted either of larceny as a servant, or of simple larceny. I directed the jury that the averments in the indictment as to the prisoner being the servant of Edward Sanders, might be rejected as surplusage, that Edward Sanders had a special property in the money, and that, if they believed the witnesses for the prosecution, they might find the prisoner guilty of simple larceny. The jury found the prisoner guilty of simple larceny.

The opinion of the Court of Criminal Appeal is requested whether this conviction was right.

Judgment was postponed ; the prisoner was remanded to prison, but has since been discharged on recognizance of bail to appear and receive judgment.

This case was not argued by counsel on either side.

Lord CAMPBELL, C.J., delivered the judgment of the court.—After reading the case he said : we are all clearly of opinion that the conviction is right. The allegation in the indictment that the prisoner was servant to Edward Sanders is quite unnecessary to the charge of simple larceny and may be rejected. The only other objection is, that the money stolen was the money of Mrs. Sanders, and it is true that the absolute property was in her ; but at the time when the prisoner stole the money, it was in the possession of Edward Sanders. He had a special property in it, and, for the purpose of this indictment, the property was well laid in him.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

January 28, 1858.

(Before Lord CAMPBELL, C.J., CROWDER and WILLES, JJ.,
and MARTIN and WATSON, BB.)

REG. v. JESSOP. (a)

False pretences—Passing a one-pound Irish Bank-note as a five-pound note.

A person who fraudulently offers a 1l. bank-note as a note for 5l. and gets it changed upon that representation, may be convicted under the statute for obtaining money by false pretences, although the party to whom it was passed could read, and the note upon the face of it afforded clearly the means of detecting the fraud.

THE following case was tried before me at the West Riding Intermediate Sessions held at Wakefield, on the 26th day of August last. The prisoner was indicted for obtaining 4l. 19s. 10½d. from Ann Perkin by falsely pretending that a certain piece of paper was a 5l. note, whereas in truth and in fact it was not a 5l. note. The evidence was as follows: Emma Perkin stated—I live with my mother at the Globe Inn, Wakefield. Monday, 16th August, a person came into the house from a quarter past five to six o'clock; he asked for a glass of beer. The prisoner was the man; he was in the taproom; I served him; the price was three halfpence; he said, "Is the master in?" I said, "No; do you want him for anything that I can tell him?" He said, "I only want this 5l. note changed." He showed me a 1l. note; it was in his hand; I took it and gave it to my mother; he drank his beer and went away; afterwards my mother sent me to one Billingtons with the note. He said something about the note. I went to the police-office; showed the note to one Appleyard, then to Burton, the inspector, to whom I gave up the note. I, my mother, and Mr. McDonald, went to the railway-station, Wakefield, twenty minutes to seven o'clock, and saw the prisoner there.

On cross-examination she stated:—I am sure he said "I only want this 5l. note changed;" the note was put into my hands; I and my mother can read and write; I looked at the note; thought it was a 5l. note.

On re-examination:—He did not ask for change until he knew the master was not in. This is the note I gave Inspector Burton; the note was put into my hand open, not crumpled up.

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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Ann Perkin stated:—I keep the Globe Inn. My daughter came to me on the 10th of August with a note; I was busy, she wanted change, I gave her 4*l.* 19*s.* 10½*d.* for the prisoner for the note. He had a checked smock and felt hat; I saw him go away; I was suspicious; I sent my daughter with the note to Billingtons; she came back; I went, on her return, to the police-office, saw Appleyard, Burton, and McDonald; we went with McDonald to the railway-station; saw the prisoner on the platform coming out of the booking-office; the train was starting for Doncaster; he had a ticket; at the station he had a black and blue plaid coat as described by my daughter.

On cross-examination:—My daughter put the note in my hand open; I laid it on the table, and put it in my purse. I can read old English; I gave the prisoner change; he said nothing to me.

On re-examination:—I did not look particularly at the note; I had no idea of its being a 1*l.* note.

William Burton stated:—I am a police-constable; I produce this note; I received it from Mrs. Perkins on the 10th of August and have had it ever since. On the face of the note is "one;" one is at each corner of the note; it is a Bank of Ireland note; one pound is clearly printed in the middle.

(The evidence of several other witnesses was set out in the case; but the above statements embrace all that is material to the question raised.)

Foster (for the prisoner) objected that there was no case to go to the jury, relying on these grounds:

First, The prosecutrix had means of detecting from the face of the note itself that it was not a 5*l.* note, by using common prudence and caution; the party having at the time the means of detection at hand need not have been deceived: (*Young's case*, 2 East, P. C. 823.)

Secondly, The note was of the same species as a 5*l.* note, differing only in quality and value, it comes within *Elkington's case*: (*R. v. Bryan*, 26 L. J. 84, M. C.; 7 Cox Crim. Cas. 312.)

The jury found the prisoner Guilty, and a sentence of four calendar months hard labour in the House of Correction was passed on him, but he was admitted to bail until the opinion of the Court of Criminal Appeal can be had.

No counsel was instructed to argue on behalf of the prisoner.

Maule, for the prosecution.—The only question is whether the putting off of an Irish 1*l.* note as a 5*l.* note and obtaining 5*l.* in change, is an obtaining of money by false pretences within the statute, the prosecutor having had the means of detecting the fraud. The case of *R. v. Young* (2 East, P. C. 823), was relied upon by the prisoner. (He was stopped.)

LORD CAMPBELL, C.J.—We all think that the conviction is good. In many cases the party giving change would not look at the note, but would give faith to the representation of the party offering it. It is a clear case within the act of Parliament; for the other point made by the prisoner's counsel is quite idle. *Conviction affirmed.*

NORTHERN CIRCUIT.

LIVERPOOL WINTER ASSIZES.

December 5, 1857.

(Before WIGHTMAN, J.)

REG. v. RICHARD MEIGH. (a)

*Forgery—Indictment—Evidence.**The prisoner was indicted for forging at Liverpool a receipt.**The first count set out the instrument showing that it was a receipt.**The second was for forging a receipt simply.**The third for forging a warrant, order, or request for the delivery of goods, and**The fourth for forging a warrant, order, or request for the transfer of goods.**Where the prisoner signed a document which entitled him to receive a delivery note, which, in the course of business of the B. Canal Company, would enable him to demand and have the goods described therein delivered to him on payment of the charges for carriage:**Held, that this was a forgery of a receipt for goods within the 11 Geo. 4 & 1 Will. 4, c. 66, s. 10.*

THE prosecutor, George Fowler, was a dealer in earthenware at Stoke-upon-Trent. It appeared from the evidence that the prisoner, with whom he had had previous transactions, called upon him and purchased four crates of earthenware, only paying him for one. It was agreed between them that all four should be consigned to the seller (the prosecutor), and that on the prisoner remitting the price of the three which remained unpaid for, the prosecutor should remit to the prisoner an order for the delivery of the crates to him, and that in the meantime they should lie at the dock in the name of George Fowler, the prosecutor. The goods were forwarded by the Bridgewater Canal to Liverpool on this understanding, and were deposited on the Duke's Dock quay. It was the ordinary course of business with the canal company (the trustees of the Duke of Bridgewater) on the arrival of goods to send a "note-deliverer," to obtain the signature of the consignee to a note, which stated the date of arrival in Liverpool, the consignee's name, and the amount of charges, in separate columns, leaving three other columns to be filled up by the consignee. The first of these latter columns was headed,

(a) Reported by E. D. M. LITTLER, Esq., Barrister-at-Law.

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"signature of the parties acknowledging that the goods are lying on the quay at Duke's Dock at their own risk," the others containing the date and hour of the making the signature in the previous column. The practice was for the note-deliverer to hand to the party signing this document, as consignee, a delivery-note, entitling the holder to the delivery of the goods on payment of the canal charges.

The note-deliverer was called, and proved that he called at an earthenware dealer's in Liverpool to inquire if he knew anything of George Fowler, the consignee. He saw the prisoner standing at the door, and asked him if he knew George Fowler? He said, "Yes, I am George Fowler." He then obtained the prisoner's signature to the book which he carried, and thereupon handed him the delivery-note.

The following is the form of the document which the prisoner signed :

Date 1857.		To whom consigned.	Specification of goods.	Charges.	Signature of parties acknowledg- ing that the goods are lying on the quay at Duke's Dock at their own risk.	Date 1857.		Time.	
October	20	G. Fowler.	4 Crates.	£ s. d. 1 14 9	George Fowler.	October	20	8	30'

The prisoner subsequently presented the delivery-note and obtained the goods. He had no authority from the prosecutor to sign for him.

Tindal Atkinson, for the prisoner, objected that the instrument was not a receipt within the 11 Geo. 4 & 1 Will. 4, c. 66, s. 10 (b); for his signature to this instrument did not entitle him to the possession of the goods but to a delivery-note merely, and he quoted *Reg. v. Cooper*: (2 C. & K. 586.)

Leofric Temple, for the prosecution, said that as the delivery-note which was given him on signing the consignee's name would entitle him to receive the goods, a constructive delivery of the goods did in fact take place on his so signing, for the liability of the consignor and also of the carrier was at an end.

WIGHTMAN, J.—The case must go to the jury, and if I think

(b) "Any acquittance or receipt either for money or goods, or any accountable receipt, either for money or goods, or for any note, bill, or other security for the payment of money."

there is any doubt I will, if necessary, reserve a case for the Court of Criminal Appeal.

The jury found the prisoner Guilty, and his Lordship deferred passing sentence: but, at the close of the assize, said he had now no doubt on the point, and passed sentence accordingly.

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NORTHERN CIRCUIT.

LIVERPOOL WINTER ASSIZES.

December 5, 1857.

(Before WIGHTMAN, J.)

REG. v. JOHN HAIGH. (a)

Larceny—20 & 21 Vict. c. 54, s. 4.

A bailee charged with fraudulently converting bailed property under the 20 & 21 Vict. c. 54, s. 4, was indicted in the ordinary form as for larceny, with a conclusion contra formam:
Held, good.

THE prisoner was indicted for having at Bolton stolen a horse the property of the prosecutor. The indictment was in the ordinary form, concluding, however, *contra formam*, &c.

It appeared from the evidence that the prosecutor had entrusted the prisoner with a horse, which he requested him to lead for him to a certain place agreed upon between them. He did not pay him anything at the time, but stated at the trial that he intended giving him a shilling for his trouble. On the way, however, to the appointed place, the prisoner sold the horse and appropriated the proceeds. He was taken into custody and committed for trial under the provisions of the 20 & 21 Vict. c. 54, s. 4. (b)

Sowler for the prosecution.

C. H. Hopwood, for the prisoner, objected that the indictment ought to have set out specially the section of the statute under which it was sought to convict him.

WIGHTMAN, J.—I do not think that necessary, but I will consider the point.

Sentence was deferred, but at the conclusion of the assize, his Lordship passed sentence of imprisonment.

(a) Reported by R. D. M. LITTLE, Esq., Barrister-at-Law.

(b) "If any person being a bailee of any property shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof, although he shall not break bulk, or otherwise determine the bailment, he shall be guilty of larceny."

NORTHERN CIRCUIT.

LIVERPOOL WINTER ASSIZES.

December 5, 1857.

(Before WIGHTMAN, J.)

REG. v. GREENWOOD. (a)

Murder—Manslaughter—Rape.

Where the prisoner committed a felony on the person of a child, whereby she died, the jury were directed that they might find a verdict of manslaughter.

THE prisoner was indicted for murder and rape on a child under ten.

It appeared from the evidence that the prisoner had connexion with the deceased, and that it was afterwards discovered she had the venereal disease.

Fernley and C. H. Hopwood, for the prosecution.

Cobbett, for the prisoner.

WIGHTMAN, J., told the jury that the malice, which constitutes murder, might be either express or implied. There was no pretence in this case that there was any malice other than what might be implied by law. There were five questions for them to consider.

First, had the prisoner connexion with her?

Secondly, did she die therefrom?

Thirdly, had she the venereal disease?

Fourthly, did she die from its effects?

Fifthly, did she get it from the prisoner?

If they were of opinion that the prisoner had connexion with her, and she died from its effects, then that act being, under the circumstances of this case, a felony in point of law, this would, of itself, be such malice as would justify them in finding him guilty of murder.

The jury retired, and, after some time, returned into court saying that they were satisfied that he had connexion, and that her death resulted therefrom, but were not agreed as to finding him guilty of murder.

WIGHTMAN, J., told them that, under these circumstances, it was open to them to find the prisoner guilty of manslaughter, and that they might ignore the doctrine of constructive malice if they thought fit.

The jury found a verdict of manslaughter, and the prisoner was ordered to be kept in penal servitude for life.

(a) Reported by R. D. M. LITTLE, Esq., Barrister-at-Law.

NORTHERN CIRCUIT.

LIVERPOOL WINTER ASSIZES.

(Before WIGHTMAN, J.)

December 5, 1857.

REG. v. PRICE AND OTHERS. (a)

Evidence.

It is competent to counsel on cross-examination to ask the witness if he had ever made a certain statement, without excepting from such question the time when he was before the magistrates.

THE prisoners were indicted for a burglary. **Fernley**, for one of the prisoners, asked a witness on cross-examination if he had been examined before the magistrates. On being answered in the affirmative, he then asked whether the witness had ever before that day made a certain statement which had formed part of his evidence.

Wheeler, for the prosecution, objected that the question should have been, whether the witness had ever made such statement at any time, excepting at the time when he was before the magistrates; for that the only admissible evidence of what was said before the magistrates was the depositions, and the question being put generally, would include what was said on that occasion.

WIGHTMAN, J., ruled that the question might be put generally.

(a) Reported by R. D. M. LITTLE, Esq., Barrister-at-Law.

COURT OF CRIMINAL APPEAL.

November 14, 1857.

(Before COCKBURN, C.J., ERLE and WILLIAMS, JJ., MARTIN and CHANNELL, BB.)

REG. v. LEWIS. (a)

Practice—Allowance and taxation of costs incurred in this court.

The costs incurred by the prosecutor upon the argument of a case reserved for this court are to be treated as part of the costs of the prosecution, which the judge presiding at the trial of the prisoner is authorized to allow under 7 Geo. 4, c. 64, s. 22; but such costs will in future be taxed by the officer of this court, who will certify the amount to the clerk of assize, or clerk of the peace, the officer of the court by which the case was reserved.

BRETT applied to the court for directions as to the allowance and taxation of the costs incurred upon the argument of this case: (see 7 Cox Crim. Cas. 277.) Application had been made to the proper taxing officer of the court by which the case was reserved, but he had declined to tax these costs, on the ground that he was not the proper officer to do so. The stat. 11 & 12 Vict. c. 79, constituting this court, makes no provision respecting the costs of proceedings taken in it: but the stat. 7 Geo. 4, c. 64, s. 22, authorizes the court, before which any person is prosecuted or tried for any felony, to order payment to the prosecutor and his witnesses of a reasonable allowance for their expenses and for their trouble and loss of time in attending before the examining magistrate, the grand jury, "and otherwise carrying on the prosecution;" and the general order therefore of the judge at the trial of the prisoner, allowing the costs of the prosecution, is sufficient to include the costs incurred in this court, when the judge reserves a case.

MARTIN, B.—I recollect making an order for the costs in a road case which I reserved for this court: (see *R. v. Hornsea*, 6 Cox Crim. Cas. 302.)

Brett.—In *Reg. v. Cluderoy* (3 Car. & K. 205) the same course was pursued; but the more difficult question is, what officer is to

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

tax the costs? In *Reg. v. Dolan* (Dears. C. C. 436; 6 Cox Crim. Cas. 453*n.*) this court was asked to direct a taxation, but refused. In *Reg. v. Woolley* (4 Cox Crim. Cas. 452) the judge who pronounced sentence at the following assizes after the case had been argued in this court, ordered the costs to be allowed; but there is considerable difficulty in the adoption of that practice on account of the language of 7 Geo. 4, c. 64, s. 22. Convenience certainly requires that the costs should be taxed by the officer of this court, who is willing to undertake the duty.

COCKBURN, C. J.—We are all of opinion that this court has no power to order the costs of this part of the prosecution; but that under 7 Geo. 4, c. 64, that power rests with the judge who tries the prisoner, and who may order these at the same time that he orders the other costs of the prosecution. We think, however, that it would be convenient that the officer of this court should certify the proper amount of the costs to be allowed in this court; and, although that certificate would not be binding upon the officers of the court below, we do not doubt that it would be universally accepted and adopted by them. We propose to make a rule of this court in reference to this subject, and will further consider the terms in which that rule should be drawn up. (*b*)

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*Allowance and
taxation of costs
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Appeal.*

(*b*) It has not been considered necessary to issue any rule of court upon this subject; but it is understood that the practice will in future be regulated by the opinion of the court as above expressed.

COURT OF CRIMINAL APPEAL.

February 1, 1858.

(Before Lord CAMPBELL, C.J., COLERIDGE and CROWDER, JJ.,
and MARTIN and WATSON, BB.)

REG. v. TREBILCOCK. (a)

Larceny—Bailment—Intention ultimately to return the property taken to the owner—Conversion by bailee—20 & 21 Vict. c. 54, s. 4.

Upon an indictment for larceny, with a count framed under 20 & 21 Vict. c. 54, s. 4, it was proved that a box of plate having been deposited with the prisoner for safe custody, he broke it open, and took out a part of the plate, which he offered to a pawnbroker as a security for 50l. His offer was declined, but he afterwards pledged the whole box of plate with another person as security for 200l. When he was called upon to restore the plate to the owner, he had not the means of redeeming it and was taken into custody.

The jury found the prisoner guilty on both counts, but recommended him to mercy, believing that he intended ultimately to return the property.

Held, that under these circumstances the prisoner was rightly convicted of larceny at common law; because the jury had found a verdict of guilty, which was well warranted by the evidence; and though they had recommended him to mercy on the ground that he intended ultimately to restore the property, that expression was not necessarily inconsistent with the verdict, and ought not to be considered equivalent to a finding, that at the time when he took the plate wrongfully he took it for the purpose of merely making a temporary use of it.

The decision in Reg. v. Holloway (3 Cox Crim. Cas. 145) confirmed, that to constitute larceny there must be an intention permanently to deprive the owner of the property.

Semble, that if not a larceny at common law it could not be made such by the 4th section of 20 & 21 Vict. c. 54.

AT the General Quarter Sessions of the Peace holden in and for the borough of Plymouth, on the 1st day of January, 1858, before Charles Saunders, Esq., Recorder, the prisoner, William Trebilcock, was tried on an indictment which charged him, first, with

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

a larceny upon the stat. 20 & 21 Vict. c. 54, s. 4, (b) in having as bailee of plate, the property of the prosecutor, fraudulently converted it to his own use; secondly, with a common larceny of the same plate. The jury found the prisoner guilty on both counts of the indictment, but recommended him to mercy, believing that he intended ultimately to return the property. The question for the opinion of the court is, whether, consistently with the ground upon which the jury recommended the prisoner to mercy, the conviction was right upon both or either of the counts.

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The case was this:—The prosecutrix, Miss Palmer, resided at Plymouth, and going to London for eight or ten days, deposited with the prisoner, a tradesman at Plymouth, who had offered to take care of anything for her during her absence, a chest of valuable plate for safe custody till she returned. The prisoner had been told that the prosecutrix would leave a parcel with him, which he said that he would put in his iron chest to keep for her. When the chest of plate was placed in the prisoner's hands it was locked (the prosecutrix keeping the key), then covered with a wrapper sewed together, and sealed in a great number of places and then tied with cord. The prisoner was not informed of the contents of this parcel, nor was any key given to him. In a day or two after the prosecutrix left for London, he had uncorded the chest, broken the seals, taken off the wrapper, procured a key, opened the chest, and taken out a part of the plate and offered it to one Woolf, at Plymouth, as a security for the advance of 50*l*. The pawnbroker took up one of the pieces of plate which bore the crest and also a superscription with the name of Sir George Magrath upon it, and expressing his dislike to have anything to do with it, the prisoner said that he was under an engagement to be married to Lady Magrath. The prosecutrix had lived with Sir George Magrath, and when he died, the plate, among other property, came into her possession. Woolf ultimately declined any advance upon it. The prisoner then communicated by letter with another pawnbroker named Druiff, at Newport in Monmouthshire, with whom the prisoner had before had bill transactions. Druiff came to the prisoner at Plymouth and advanced him 200*l*., taking bills for the amount, and the whole chest of plate worth from 500*l*. to 600*l*., as a collateral security for the loan. Druiff took the plate away with him to Newport. The prisoner, by way of accounting to Druiff for the possession of the plate, represented to him that he was going to get married to the lady of the late Sir George Magrath, and that she had given him the plate to take care of till they were married. The prosecutrix went to London on the 8th day of November, and returned on the 17th of the same month. On her return the prosecutrix tried often to see the prisoner but could not do so till the 26th. When she first saw him, and asked him for

(b) The section is as follows:—"If any person being a bailee of any property shall fraudulently take or convert it to his own use, or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, he shall be guilty of larceny."

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the parcel, the prisoner said he would send it to her the same evening. It was not sent. The prosecutrix went often backwards and forwards to the prisoner's shop and private residence to see the prisoner, but could not see him again till the 2nd of December, when the prosecutrix insisted upon instantly having her parcel. The prisoner said she could not have it as it was out of town, he had sent it to Bristol; then he said it was now further than Bristol, that it was in Wales, but that he would write a letter and she should have it on Friday. The parcel did not arrive. The prisoner refused to tell in whose hands it was, but the prosecutrix had learnt from the prisoner's father that Druiff had it. The inspector of police went to Newport and found the chest of plate there, but Druiff refused to give it up unless upon payment of the 200*l.* for which it had been deposited with him as security. The prisoner could not redeem it, and upon the facts being made known to the prosecutrix she had the prisoner taken into custody on a charge of stealing, and the police took possession of the chest of plate as stolen property.

Upon the finding of the jury, with the recommendation to mercy, above stated, the counsel for the prisoner contended that to support either of the counts in the indictment, it was necessary that the prisoner should have intended permanently to deprive the prosecutrix of her property, and that, as the jury believed that his intention was ultimately to return it, the verdict was wrong.

The prisoner was committed to prison, and sentence deferred until the opinion of the judges shall have been obtained upon the question raised. If the court shall be of opinion that the ground upon which the jury recommended the prisoner to mercy may consist with the verdict upon both or either of the counts of the indictment, the verdict to stand upon both or either of the counts accordingly. If the recommendation may not consist with the verdict on either count, then the verdict to be set aside, and a verdict of not guilty to be recorded.

E. W. Cox, for the prisoner.—The question is whether the recent statute, 20 & 21 Vict. c. 54, s. 4, alters the general law of larceny in any other respect than making a bailee liable.

Lord CAMPBELL, C.J.—If this was larceny at all, it was larceny at common law. The statute would make no difference in this respect.

COLERIDGE, J.—If not a larceny at common law the new statute would not make it such; so that the only question is whether the prisoner could properly be convicted of larceny at common law. The jury have found him guilty.

E. W. Cox.—Yes; but they recommended him to mercy on a ground which shows that a verdict of guilty is wrong. They found that he intended ultimately to return the property to the owner.

CROWDER, J.—That is, if he could get it back again.

E. W. Cox.—The law on this subject is distinctly laid down in *R. v. Holloway* (3 Cox Crim. Cas. 145); and still more recently

in *R. v. Poole and Yeates*: (7 Cox Crim. Cas. 373.) In *R. v. Holloway*, Parke, B., said, that in order to constitute larceny, there must be the intention to deprive the owner wholly of his property, to usurp the entire dominion over the chattels taken, and to make them his own; and Lord Denman used similar language, putting the case of a man taking a horse, with the intention of riding him throughout England, and then returning him.

COLERIDGE, J.—But in this case the jury do not say that at the time of the taking the prisoner intended to return the plate.

LORD CAMPBELL, C.J.—On the contrary, they negative it by finding him guilty.

E. W. Cox.—It is necessarily implied in their statement, that when he parted with it to the pledgee, he had it in his mind to get it back again and restore it to the owner.

LORD CAMPBELL, C.J.—Your general proposition of law is right enough, but it does not apply to this case.

E. W. Cox.—If the court interprets the expression used by the jury, as meaning only that at some time after the larceny the prisoner intended to return the property, the argument founded on *R. v. Holloway* necessarily fails. But that could not be the meaning of their finding. The alleged larceny was complete at the moment of depositing the plate with the pledgee. It was for that he was tried, and to that alone was the attention of the jury directed. They had nothing to do with any subsequent intent. Their conclusion could have had reference only to the felonious act charged in the indictment, and to the moment of committing it, and if they were of opinion that he had then an intention to return it, of which there is no doubt, he is not guilty of larceny.

Carter, for the prosecution, was not called upon.

LORD CAMPBELL, C.J.—The general proposition contended for by Mr. Cox is perfectly correct. To constitute larceny, there must be an intention on the part of the thief completely to appropriate the property to his own use; and if at the time of the asportation his intention is to make a mere temporary use of the chattels taken, so that the *dominus* should again have the use of them afterwards, that is a trespass, but not a felony; but that law does not apply to this case. Here there was abundant evidence of a larceny at common law; abundant evidence from which the jury might find that the prisoner feloniously stole the plate; and the jury have found a verdict of guilty. But they have recommended him to mercy, and accompanied that recommendation with a statement as to the prisoner's intention to return the stolen property. Now I doubt whether what the jury say in giving their reason for recommending the prisoner to mercy, is to be considered as part of their finding; but even assuming it to be so, all that they say is, that he intended ultimately to return the property; not that at the time of the wrongful taking he originally intended to make a merely temporary use of it.

COLERIDGE, J.—I am of the same opinion. There is no question about the law in this case; but the question is merely as to

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the facts. And upon the facts it appears that the prisoner had put it out of his power to return the plate which he had taken. Then what must we do in order to make sense of the finding of the jury? It is to be observed, that the recommendation to mercy in itself assumes that the verdict of guilty is correct: but the jury seem to have thought that the prisoner had it in his mind at some uncertain time, if he could get hold of it again, to restore the property, and they might consider that a sufficient reason for recommending him to mercy. That interpretation makes sense of their finding, whilst the construction put upon it by Mr. Cox renders their conduct quite inconsistent and insensible.

MARTIN, B.—I am of opinion that the recommendation to mercy, and the words which accompanied it, were no part of the verdict at all, and that when the jury said guilty, there was an end of the matter, so far as the verdict was concerned. But I also think that even if it did form part of the verdict, it would not have the effect of bringing it within the principle of the cases on which Mr. Cox relies. It seems to me quite clear that this prisoner stole the plate, and then pledged it for 200*l.*, and I think that in so doing he “usurped the entire dominion of it” within the meaning of that expression as used by Parke, B., in the case cited. If, therefore, a special verdict had been found in the very terms used by the jury, when they recommended the prisoner to mercy, I should have said that he was still guilty of larceny.

CROWDER, J.—It seems to me, also, that upon the facts of this case no other rational conclusion could be arrived at, except that the prisoner stole the plate. He broke open the box, and took out the plate and stole it, but the jury recommended him to mercy because they thought that he had an intention of ultimately restoring it. Probably it very often happens that when stolen goods are pawned, there is an intention to get them back again, if the person pawning them should ever be able to do so, and in that case to return them; but such an intention affords no ground for setting aside a verdict of guilty, when the offence of larceny is satisfactorily proved by the evidence.

WATSON, B.—I also think that this is the clearest case of larceny possible, though the jury have recommended the prisoner to mercy, because they thought that he would ultimately have restored the property if he could have got it back.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

January 23, 1858.

(Before Lord CAMPBELL, C.J., COLERIDGE and CROWDER, JJ.,
and MARTIN and WATSON, BB.)

REG. v. WRIGHT. (a)

Larceny by servant—Taking from the master's possession—Necessity of proving specific amount taken—General deficiency.

A. was employed by a banking company to conduct an office at B., and the whole of the duties there were discharged by him alone. He was paid a salary, for which he was bound to provide a place for carrying on the bank business, and the office so provided was attached to his own house in which he carried on a separate business. The office was fitted up by the bank, and an iron safe provided, into which it was A.'s duty to put each night the money received during the day and which had not been required for the purposes of the bank. One key of his safe was kept by the banking company. He furnished weekly accounts of moneys received and paid by him, showing the balance in his hands, and of what notes, cash, or securities that balance consisted. Audits of his accounts were made occasionally and his cash in hand examined. On the last of such audits he was found deficient in his cash to the amount of 3000l.; and he admitted that he had taken that amount. On the last previous audit, two years before, his cash had been found correct. The learned judge advised the jury to find the prisoner guilty of larceny, if they were satisfied, upon the whole of the facts, that any part of the sum admitted to have been misappropriated had at any time during the two years been taken from money which, having been received from customers, had before such taking been placed in the safe and included in the weekly accounts furnished by the prisoner. The jury found the prisoner guilty of larceny, as a clerk, in having stolen some money received from customers which, before such stealing, had been placed in the safe and made the subject of a weekly account:

Held, that the conviction was right, there being evidence from which the jury might draw the conclusion that some part of the money taken by the prisoner had been previously reduced into the master's possession by being put into the safe, and it not being necessary that they should find any specific amount to have been stolen on any particular day.

THE prisoner was indicted for embezzling money, the property of the public officer of the Stamford, Spalding, and Boston Banking Company. He was employed by the bank to conduct

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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an office at Wainfleet, in connection with the Boston branch of the said bank, and the whole of the duties were discharged by him alone. He was paid a salary of 150*l.* a year, for which he was bound to provide a place for carrying on the business, and the office so provided was attached to his own house, in which house he carried on the business of a wine and spirit merchant.

The office was fitted up at the expense of the bank, and there was in it an iron box or safe provided by, and the property of, the bank, into which it was the prisoner's duty to put any money received during the day, and which had not been required for the purposes of the bank. There were duplicate keys of this safe, one of which was kept in the safe at Boston under the control of the manager there. It was the duty of the prisoner to receive money from the customers to be put to their account with the Boston branch, and to pay cheques drawn on the Boston branch of the bank. He furnished to the manager of the Boston branch every Monday a return of his transactions during the week, showing the money received from customers and the money paid out, and containing a statement of the balance remaining in his hands, and of the particulars of which it consisted, specifying the notes, cash, or securities; and it was his duty to pay over weekly to the Boston manager any excess he did not want for the banking purposes of the office at Wainfleet. Besides the money he received from customers, he received money from the Boston branch from time to time when he required it for the purpose of carrying on the business at Wainfleet, and the sums so received were entered in the above-mentioned weekly accounts.

Audits of his accounts were made from time to time, and the amount of cash he had in hand examined.

An audit meeting was held on the 29th of September, 1855, when his accounts were inspected and found correct, and his cash counted and found to be right. From this time up to, and inclusive of, Monday the 7th September, 1857, when he made his usual weekly statement, the accounts were furnished at the proper times and were correct in their statements of receipts and payments, but no audit or examination took place of the balances appearing from the weekly accounts to remain in the prisoner's hands.

On the 12th of September, 1857, the public officer of the bank and the manager of the Boston branch called on the prisoner, and made an appointment to examine his cash in hand, when the prisoner said he was very sorry, he was about 3000*l.* short in his cash; that he had not the moral courage to speak out before, but it was so. He handed over all the cash he said was left, amounting to 755*l.* 10*s.* He took this from a drawer in the counter in the office, not from the safe. The drawer was a convenient place for the deposit of the money for banking purposes during the day. The prisoner then in the presence of the manager of the Boston branch made up the account to that date, showing a deficiency of 3021*l.* 9*s.* 9*d.*

When before the magistrates, the prisoner made the following statement :

"I admit that I have taken the amount of money which appears in my weekly return dated September 12th, 1857, and entered as a deficiency of 3021*l.* 9*s.* 9*d.*"

The counsel for the prosecution contended that these facts were evidence to go to the jury of a larceny. That the money sent from the Boston branch had been in the possession of the bank so as to make the taking of it by the prisoner amount to larceny. Also that the money received at Wainfleet from the customers, or the balance of it after the payments of the day, would, if the prisoner performed his duty (as it might, in the absence of contradictory evidence, be presumed he did), be put into the safe of the bank at night, and that when put there it was received into the possession of the bank, and no longer *in transitu* in the hands of the prisoner as the servant receiving it, and that the bank keeping a duplicate key of the safe, and the box having been bought by them and the office fitted up by them, though the house was the prisoner's, the box was the box of the bank, and the money deposited therein was money reduced into the possession of the bank, as in the case of the till of a shopkeeper.

And further, that the weekly statements made by the prisoner to the manager of the Boston branch, and received by him, of the balance remaining in the prisoner's hands of sums received during the week from customers, amounted to a statement by the prisoner that he held that balance for the bank and as the money of the bank, and to an acquiescence by the said manager in his keeping it as their clerk or servant, and that thenceforth his possession of that balance, or any part of it, was a possession by the bank, so as to make it the subject of larceny, if afterwards taken by the prisoner.

The prisoner's counsel contended that the prisoner was not a clerk or servant. That there was, under the circumstances, no such possession by the prisoner as could be treated as a possession by the bank. That there was no evidence that any part of the sum misappropriated had ever been in the possession of the bank, for it might all have been money received from customers and intercepted and misappropriated before it was placed in the safe; and that all the money found on the 12th of September actually was in the drawer of the counter, and not in the safe; and further, that the money when paid into the safe, was in the possession of the prisoner and not in that of the bank; that the house and all in it were the prisoner's for all purposes of possession, and he might have used the safe to hold his own moneys coming to him as a wine merchant, or otherwise mixed them with the money coming from the bank customers.

I advised the jury to find the prisoner guilty of larceny, if they were satisfied on the whole of the facts that any part of the sum admitted to have been misappropriated had, at any time during the two years, been taken from the money sent by the Boston

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branch to the prisoner, or from money which having been received from customers had, before such taking, been placed in the safe and included in the weekly accounts furnished by the prisoner.

The jury found the prisoner guilty of larceny, as a clerk, in having stolen some money received from customers which, before such stealing, had been placed in the safe and made the subject of a weekly account.

They said they did not find that the prisoner stole any of the money which had been sent to him from the branch bank of Boston.

The question for the opinion of the court is, whether the facts furnish sufficient evidence of a larceny, and whether the conviction was correct?

The prisoner was sentenced to six years' penal servitude, and is now in confinement under that sentence.

CHARLES CROMPTON.

O'Brien, for the prisoner.—There are two points which arise on this case. First, There is no evidence of larceny. Secondly, If there was any evidence for the jury, the verdict is bad for uncertainty. As to the first, the evidence was that the prisoner admitted a misappropriation of money to the amount of 3000*l.*; but that alone will not establish a larceny. Some facts must be proved to establish a dealing with some money in a manner which would make the prisoner guilty of larceny. It is conceded that until the money received by him had been deposited in the safe, there could be no stealing of it by him; and there is no evidence that he ever put any money into that safe.

Lord CAMPBELL, C. J.—It was his duty to do so.

O'Brien.—In the case of a man who admits a misappropriation of 3000*l.*, no presumption can be made that he would do his duty. The indictment contains in effect only one count; and suppose that count had charged the stealing of 50*l.* or any other sum, forming part of the total deficiency, what evidence is there applicable to any such sum?

MARTIN, B.—You say it is surmise only.

O'Brien.—Exactly so. It is the vague generality of the verdict which alone gives some appearance of truth to the contention that there is any evidence to support it. If the particulars are inquired into, it is at once manifest that there is really no evidence of any act of stealing.

COLERIDGE, J.—He admitted before the magistrates that he had "taken" the money. That expression imports that the money had been in his master's possession.

O'Brien.—When he made that statement he was charged with embezzlement, not larceny. And the evidence of a general deficiency is more appropriate to a charge of embezzlement, than to a charge of larceny; but even on an indictment for embezzlement, such evidence was held insufficient to convict in *Grove's case*: (1 Moo. C. C. 447.) (b)

(b) See *R. v. Moah*, 7 Cox Crim. Cas. 60.

MARTIN, B.—What difference is there between the till and the safe?

O'Brien.—It seems to be conceded that the money in the till was still in the prisoner's possession; but, even if not, there is no evidence that it ever reached the till. It is quite consistent with all the facts proved, that all the money misappropriated by the prisoner may have been intercepted by him before it was placed even in the till. But further, in this case, even if it reached the till or the safe, the possession of the prisoner was never at an end; considering that he had an original exclusive possession of the shop, he never did any act sufficient to divest himself of that possession. The conflicting authorities on this subject may be reconciled if attention is paid to the nature and extent of the authority with which the servant was invested in each case. In this case the prisoner, as the manager of a bank, had a complete general control over the moneys received at the bank-counter. He is authorized to deal with it afterwards.

COLERIDGE, J.—If a stranger pays in a shop with marked money, and the shopman abstracts from the till, what offence does he commit?

O'Brien.—Larceny.

COLERIDGE, J.—But the shopman has a right to take money from the till for his master's purposes.

O'Brien.—The distinction between the two cases is this. The shopman accounts to his master by placing the money in the till; and then his exclusive possession ceases. In this case there was another time for accounting to the master and paying over the balance, and, consequently, the act of putting money into the till or safe did not divest the prisoner's possession. The mere declaration by him that he held so much money for his master does not affect the question of possession; and the weekly returns amount only to such a declaration: (*R. v. Goodenough*, 6 Cox Crim. Cas. 206.) If the evidence shows embezzlement, that will not support the conviction for larceny: (*R. v. Gorbett*, 7 Cox Crim. Cas. 221.)

Secondly, what have the jury found? Only that on some occasion the prisoner stole some money: but it is submitted that that finding is too vague and uncertain to sustain a conviction. The prisoner is not furnished with the information necessary to enable him to defend himself from a second charge for the same offence. If a verdict so general is enough, he may be indicted again as many times as there are coins in the whole sum misappropriated. It is clear that before the stat. 14 & 15 Vict. c. 100, s. 18, this verdict would have been insufficient; because up to that time it was necessary to allege and prove the specific coins taken. In *R. v. Fry* (Russ. & Ry. 482), it was held insufficient to aver the taking of 10*l.* in moneys numbered.

Lord CAMPBELL, C. J.—I think that case has not met with general approbation.

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O'Brien.—In *R. v. Bond* (4 Cox Crim. Cas. 231) the same principle was acted upon.

Lord CAMPBELL, C. J.—At all events the statute has set that question at rest.

COLERIDGE, J.—In *Grove's case* there was precisely the same uncertainty.

O'Brien.—There were seven dissentient judges. But the statute 14 & 15 Vict. c. 100, s. 18, was passed to meet the difficulty suggested by *Bond's case*; and it dispenses with the necessity of specifying the particular coins taken. It is enough now to allege and prove the amount of money taken; but that allegation and proof are still necessary. It must be averred and proved that he stole money to a certain amount.

Lord CAMPBELL, C. J.—If a man is charged with stealing one hundred pounds weight of sugar, the jury may find a general verdict of guilty, though only one pound is proved to have been stolen.

O'Brien.—That is because they can find certainly that he stole one pound.

Lord CAMPBELL, C. J.—I think it is contrary to the usual practice to require the jury to specify the amount or quantity taken.

COLERIDGE, J.—Suppose the jury found in a case of sheep stealing that they could not tell whether nineteen or twenty were taken.

O'Brien.—That would be a finding that at least nineteen were taken. Hawkins (P. C. bk. 2, c. 25 s. 59) gives as the reason for requiring this degree of certainty that the court may know what punishment to award.

Lord CAMPBELL, C. J.—In this case the jury have found that the prisoner stole at least one farthing.

O'Brien.—That is not found.

CROMPTON, J.—The indictment only means that he stole some money, and that is proved.

COLERIDGE, J.—You must contend that if the jury say, we cannot tell what amount is stolen, that is a verdict of not guilty.

O'Brien.—That is the contention; and it is borne out by the cases decided before the statute 14 & 15 Vict. c. 100, and by the language of sect. 18 of that statute.

MARTIN, B.—Suppose this case: at the end of a week fifty sovereigns are missed from a certain safe. Every night during the week the prisoner has been seen to go to the safe; and, at the end of it, he is found in possession of fifty sovereigns. Is he to be acquitted because it is impossible to tell on which night he took a sovereign?

O'Brien.—It would be clear in that case that he must have taken one sovereign on some one night. The evidence must be such as to enable the jury to pronounce their verdict with reference to some particular act of stealing.

COLERIDGE, J.—But that may be matter of inference from all the circumstances. You are always at liberty to go into the whole transaction: (*R. v. Ellis*, 6 B. & C. 145.)

O'Brien.—Still in the result if you cannot condescend upon any particular occasion and show what was taken, the prisoner must escape. That is the effect of *Bond's case*, and the statute has not altered the law except as to the necessity of specifying the particular coin.

COLERIDGE, J.—It is really impossible for you to maintain this point.

Boden, for the prosecution, was not called upon.

Lord CAMPBELL, C.J.—I am of opinion that this conviction is right. The first question is whether there was any evidence to show that the prisoner took from the safe any money which had been deposited by the customers of the bank, and which had been placed by the prisoner in that safe; and I think that there was such evidence. It is found to have been the duty of the prisoner, when money was paid over the counter by customers, to carry it, when night came, to the safe, and deposit it there to remain in a state of security until it should be taken out again to be applied to the purposes of the bank; and I think that when it was so placed in the safe, the exclusive possession of the prisoner was determined, that being a box or safe furnished by the employer, of which the employer had a duplicate key. In that respect the safe in this case very much resembles the till in a shop in London, where the shopman has access to it for lawful purposes, though if he takes money from it, *animo furandi*, he is a thief. I cannot distinguish such a case from the present; and I think the conviction must be affirmed.

COLERIDGE, J.—I am of the same opinion. Looking at all the circumstances of the case, the amount of money misappropriated, the statement of the prisoner himself, and the proper course of business in the office, I think the jury were well warranted in concluding that the money received from the customers was deposited from time to time in the safe. When that was done, in my opinion, the exclusive possession of the prisoner was determined, and though he had a right in the course of his duty, as a servant of the bank, afterwards to take out that money for the master's purposes, yet if he took it out for his own unlawful purpose, he was guilty of larceny; and I think there was abundant evidence of his so doing.

MARTIN, B.—I cannot distinguish this from the case which I put during the argument, and which was admitted to be a case of larceny. Also if a shopman receives coin from a customer and puts it into the till, but afterwards takes it out for the purpose of appropriating it to his own use, he is acknowledged to be guilty of larceny; and it seems to me to make no difference whether the shop is at the time under the immediate control of the master, or whether it is at some distance from the house where the master resides. Here the banking company had clearly reserved to themselves a control over the safe in which the money was to be

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kept. The Boston manager had a key of it, so that he might have come at any time and got access to it. I cannot but regret that the law is in such a state as to give occasion for questions such as this.

CROWDER, J.—I also think that this was clearly a case of larceny. Indeed the safe and the duplicate key seem to have been provided for the purpose of establishing that sort of control over the money there, which would make the taking of it, *animo furandi*, larceny. It was said that the prisoner had the entire control of the office, and that he might apply all the funds in any way which the bank business rendered necessary or desirable; but the right to use it for his master's business makes no difference. He was still guilty of stealing when he took it for his own purposes.

WATSON, B.—This seems to me a very plain case. The safe was provided by the masters as a place of deposit and safe custody for their money; but the prisoner had access to that safe for the purposes of the banking business, and the jury find in effect that he stole some money from that safe. Often nice distinctions arise between larceny and embezzlement; and though I do not think there is any difficulty in this instance, it would be creditable to the legislature to provide that every case of embezzlement, without reference to any of those nice distinctions, should be an offence punishable by the law.

Conviction affirmed.

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COURT OF CRIMINAL APPEAL.

November 26, 1857.

(Before MONAHAN, C. J., PIGOT, C. B., CRAMPTON, BALL and KEOGH, JJ., and PENNEFATHER, RICHARDS and GREENE, BB.)

REG. v. WARD. (a)

Indictment, form of—Larceny—Ownership of property—14 & 15 Vict. c. 100, s. 8.

An indictment for larceny, and receiving goods knowing them to have been stolen, is bad, if it does not state to whom the goods belonged; and the defect cannot be amended, nor is it cured by 14 & 15 Vict. c. 100, s. 8.

THE prisoner was indicted before the Assistant-Barrister for Longford County, for stealing goods, and also for receiving goods, knowing them to have been stolen. She was convicted, and, after conviction, the Assistant-Barrister called for the indictment, in which it appeared that the goods were described as the goods of —. The Assistant-Barrister thought he had not power to amend where there was a *total omission* in the indictment as regards the ownership of the property.

Corballis, Q.C., on the part of the Crown, now applied that the indictment be amended, by inserting the name of the owner.

MONAHAN, C.J.—We are all of opinion that this case is not distinguishable from that of *Silk v. Reg. in Error* (17 Jur. 207), which decides, that where there is an omission of the allegation as to the ownership of the property, such cannot be looked upon as a formal defect, and, therefore, the indictment cannot now be amended. It is the duty of the court to see that a prisoner is properly and legally convicted. In this case the prisoner must be discharged.

(a) We are indebted to *The Irish Jurist* for the Report of this Case.

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COURT OF CRIMINAL APPEAL.

November 26, 1857.

(Before MONAHAN, C.J., PIGOT, C.B., CRAMPTON, BALL,
and KEOGH, JJ., and PENNEFATHER, RICHARDS and
GREENE, BB.)

REG. v. HELEN ROBERTS. (a)

*Forging indorsement on a foreign bill—Statutes 39 Geo. 3, c. 63 ;
43 Geo. 3, c. 139 ; 11 Geo. 4 & 1 Will. 4, c. 66.*

*The forging of an indorsement in this country, on a bill drawn abroad
on a person in this country and payable in this country, is an offence
within the 39 Geo. 3, c. 63.*

THIS case came before the court on a case reserved by the
Right Honourable Baron Greene. The prisoner was in-
dicted for forging an indorsement on a foreign bill of exchange.
The following was the indictment :—The jurors for our Lady the
Queen, upon their oaths present, that Helen Roberts, late of
Killucan, in the county of Westmeath, spinster, on the 6th day
of May, in the year of our Lord, 1857, at Kingstown, in the
county of Dublin, having in her custody and possession a certain
bill of exchange, which said bill of exchange is as follows, that is to
say :—

No. 57322.

Philadelphia

£1 10 0 stg.

4 April 1857

On demand pay to Margaret M'Carthy, or order, one pound ten
shillings, stg. for value received, which charge to the account of

Yours respectfully,

Robert Taylor & Co.

Robert Taylor & Co.

To Messrs. James Corscaden & Co.

Londonderry.

She, the said Helen Roberts, afterwards, on the same day and
year aforesaid, in the county of Dublin aforesaid, feloniously
did falsely make, forge, and counterfeit on the said bill of exchange,

(a) We are indebted to *The Irish Jurist* for the Report of this Case.

an indorsement of the said bill of exchange, which said falsely made, forged, and counterfeit indorsement is as follows, that is to say, "Mary M'Carthy," with intent thereby then and there to defraud, contrary to the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. The second count was for uttering, as true, the counterfeit indorsement. The third count was for forging an indorsement, purporting to be the indorsement of Mary M'Carthy. The fourth count was for uttering, as true, a certain forged indorsement, purporting to be the indorsement of Mary M'Carthy. The fifth count was for forging an indorsement, purporting to be the indorsement of one Anne Smith; and the sixth count was for uttering the same. The following is the case reserved for the consideration of the Court of Appeal:—The prisoner was convicted before Baron Richards and me, at the last sitting of the Commission Court at Dublin, upon an indictment, a copy of which is hereunto annexed. Mr. Curran, on behalf of the prisoner, moved to have judgment arrested, so far as related to the counts setting out the bill of exchange, and to have a verdict of acquittal directed upon the general points, upon the ground, that according to the laws in force in Ireland, the facts charged in the indictment of forging or uttering as genuine a forged indorsement, upon such a bill of exchange as was set out in the indictment and proved in evidence, do not amount to a criminal offence. The indictment was grounded upon the Irish statute, 39 Geo. 3, c. 63, which made the forging or uttering an indorsement upon "*any bill of exchange*," a capital felony. This statute is still in force, although the punishment has been mitigated; first, to transportation for life, by 2 & 3 Will. 4, c. 123, and, subsequently, to transportation for life, or for seven years, or imprisonment, by 1 Vict. c. 84. The prisoner's counsel contended that the case did not fall within the 39 Geo. 3, c. 63, inasmuch as that statute, although using the general terms, "*any bill of exchange*," must be construed as confined to inland bills of exchange solely, inasmuch as a subsequent statute, namely, the 43 Geo. 3, c. 139, amounts to a legislative exposition of the 39 Geo. 3, and to a declaration that the latter act did not include foreign bills. The 43 Geo. 3, c. 139, is intituled "An Act for preventing the forging and counterfeiting of foreign bills of exchange, and of foreign promissory notes, and orders for the payment of money, and for preventing the counterfeiting of foreign copper money," and enacts, amongst other things, that if any person shall, within any part of the United Kingdom of Great Britain and Ireland, falsely make, forge, and counterfeit, &c., any bill of exchange, purporting to be the bill of exchange of any person resident in any foreign state or country, with intent to defraud any person whatsoever, whether such bill of exchange be in the English language, or any foreign language or languages, or partly in one and partly in the other, or shall, within any part of the United Kingdom, utter, &c., any such forged bill of exchange, every person so offending shall be deemed to be guilty of felony,

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and transported for any term not exceeding fourteen years. The statute 43 Geo. 3, being an enacting and not a declaratory statute, counsel for the prisoner submitted that the bill set forth in the indictment fell expressly within the description of the enactment, which, for the first time, made the forgery of such a bill criminal, and made it punishable in a different and less penal way than the 39 Geo. 3, c. 63, had made the offences therein mentioned punishable. That, had the forging of a foreign bill of exchange been understood to have been provided for by 39 Geo. 3, c. 63, the 43 Geo. 3, c. 139, would have been unnecessary; and that if the 39 Geo. 3, c. 63, had embraced such a case as the present, the Legislature must be supposed to have intended to alter the 39 Geo. 3, so far as related to the punishment; and further, that if the 43 Geo. 3, c. 139, was introductive of a new law, as to the forging of foreign bills, it must in Ireland (where it is still unrepealed) be considered as the only statute applicable to foreign bills, in which case the indictment could not be supported under it, inasmuch as, although it provides for the case of forging the bill of exchange itself, it is silent with respect to the forging or uttering of an indorsement upon a bill. The case of *Rex v. Dick* (1 Leach C. C. 68), and *Rex v. M'Kay* (Russ. & Ry. C. C. 71), were relied upon by the prisoner's counsel, and also a passage in Chitty's Criminal Law, vol. 3, 1034, in which Mr. Chitty seems to have been of opinion, that the 43 Geo. 3, c. 139, had been passed in consequence of the previous English statutes, 2 Geo. 2, c. 25, and 7 Geo. 2, c. 22 (which are analogous to the Irish Act 39 Geo. 3, c. 63), having included only inland bills. The 43 Geo. 3, c. 139, has been repealed as to England, so far as it relates to the present inquiry, by the act 11 Geo. 4 & 1 Will. 4, c. 66, which consolidates the English acts relating to forgery, and in the 3rd section re-enacts, substantially, the provisions in the English statutes of Geo. 2; but Ireland is expressly excluded from the operation of 1 Will. 4, c. 66, and, consequently, the 43 Geo. 3, c. 139, is in force in Ireland, with respect to any offences which properly, and in point of law, fall within it. The 30th section of 1 Will. 4, c. 66, was adverted to, as affording some light as to the proper construction of the 3rd section, and as showing that a bill of exchange, such as was the subject of the present indictment, would come within the words of that section, and, consequently, within the similar words of the 39 Geo. 3, c. 63, Irish. No direct authority, as it appeared to me, had been adduced, bearing upon the point submitted by the prisoner's counsel; and as the case is one of considerable importance, and, as a serious, and, possibly, extensive class of offences in Ireland, are dispunishable, should the objection made by the prisoner's counsel prevail, I thought it right, with the concurrence of Baron Richards, to reserve the point for the consideration of the Court of Criminal Appeal, and to respite the sentence. The questions, therefore, upon which I respectfully request the opinion of the judges are—First, whether the indictment in this case (that is, so far as it sets out the instrument) is sustainable

under any statute in force in Ireland, and, if so, what statute? Secondly, If the facts charged in the indictment do not constitute an offence within any such statute, do they disclose an indictable offence at the common law? I have only to refer, in addition, to one or two cases not cited on the argument, and also to a precedent which I have found. The cases are, *Rex v. Kirkwood* (1 Moo. C. C. 311), and *Rex v. Goldstein* (3 Brod. & Bing. 211), and reported, also, in other books. The precedent is to be found in the "Crown Circuit Companion," 254 (edition of 1820), and purports to be upon the statutes 2 Geo. 2, and 7 Geo. 2, Eng., and was framed long before the 43 Geo. 3, c. 139. The precedent is adopted by Mr. Starkie, in his volume on Criminal Pleading, who, although he wrote long subsequently to the 43 Geo. 3, c. 139, does not refer to that act, but only to the statutes of Geo. 2.

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Curran (with him *W. J. Sydney*) appeared for the prisoner.

Corballis, Q.C. (with him *H. Concannon*) appeared for the Crown.

The arguments and facts of the case appear sufficiently in the case reserved, and in the judgment.

MONAHAN, C.J.—This case was reserved by Barons Greene and Richards, from the late commission. The prisoner was charged with the forging of an indorsement on a bill of exchange stated in the indictment. It appears on the face of the indictment that the bill purports to have been drawn in Philadelphia, on the 4th of April, 1857, directed to Messrs. James Corscaden and Company, London-derry, and requires them, for Robert Taylor and Co., to pay Margaret M'Carthy, or order, one pound ten shillings, for value received. There were general counts, also, in the indictment. It appeared at the trial that the bill was drawn in Philadelphia, in the United States. There is no averment that the bill was drawn out of the country. There is no statement where Philadelphia is; there is not, therefore, any ground for arresting the judgment: but we are not making any objection to the proceedings on account of that irregularity, nor are we about to decide the case on that ground, I merely make this observation lest it be concluded that, because it was drawn in Philadelphia, it was drawn in the United States. But the case comes to this: the allegation of the prisoner is that, because this bill of exchange was drawn upon a person resident in this country, and payable by a person resident in this country, that there is no act of Parliament making the forging and uttering of an indorsement thereon, in this country, a criminal offence. The question arises, whether this comes within the 39 Geo. 3, c. 63, s. 1, which is an Irish act, relating to the forging of bills of exchange, and which enacts, that the forging of any bill of exchange or indorsement upon such bill, is a felony, and that the person so forging is punishable with death, which punishment has since, by a subsequent statute, been mitigated. The words of the act are comprehensive enough to embrace *all bills* whether foreign or inland; and there is no doubt but that the indorsement on an inland bill is

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within the mischief of the act ; and the question is, is there anything to take this case out of the wording and intent of the act ? The argument is, that because the 43 Geo. 3, c. 139, makes the forging of foreign bills a felony, punishable by transportation, instead of death, that implies that foreign bills are not within the act 39 Geo. 3, c. 63 ; and cases were cited to show, that it was doubtful whether the case of foreign bills came within the latter act. The first case referred to was the case of *Rex v. Dick* : (1 Leach, Cr. C. 68.) It is necessary to examine that case, and the reasons for the doubts there entertained. The prisoner was convicted at Newcastle-upon-Tyne, in 1770, of knowingly uttering a forged and counterfeited writing obligatory, commonly called a Scotch bank-note, with intent to defraud, &c. The note was made in Aberdeen, and was payable in Aberdeen. The question was, whether the note was within the meaning of the 2 Geo. 2, c. 25, which made the forging or uttering of any writing obligatory a capital offence, and, if so, whether the uttering of it in England was a felony ; and the judges were divided in opinion, the 4th section of that statute providing that that statute should not extend to Scotland, and the note being made payable locally where it was drawn ; so that it appears that the difficulty which arose in that case, was in consequence of its appearing that the whole of the instrument which was uttered, knowing it to be forged, on the face of it purported to be payable out of the kingdom, and was altogether a Scotch contract. If there is any difficulty about that decision, the explanation of it is to be found in the case in Russ. & Ry. Crim. Cas. 71 (*M'Kay's case*). There the prisoner was tried at the Old Bailey, on an indictment for uttering a certain promissory note for the payment of five pounds. The note was drawn at Edinburgh, on the British Linen Company, which was a Scotch corporation, so that it was a Scotch contract altogether. An objection was taken, that the instrument only entitled the party to demand payment in Scotland, and could not be put in suit in England, and, therefore, not within the statute. The case of *Rex v. Dick*, and the opinion of the court concerning the locality of contracts, in *Robinson v. Bland* (2 Burr. 1078), were referred to. So that these cases show clearly that the doubt which existed was altogether with reference to the forging of a bill, which was payable abroad, and in a foreign country. It is unnecessary to say whether these doubts were well or ill founded. The subsequent act of 43 Geo. 3, c. 139, recites that the practice of forging and counterfeiting foreign bills of exchange, foreign promissory notes, and foreign orders for payment of money, had of late greatly increased ; and plates of such notes, bills, and orders, had been, in some instances, engraven within the United Kingdom of Great Britain and Ireland, whereby such forgeries have been more easily committed, and it is expedient that effectual provision should be made for the preventing of the same. And then it enacts—That if any person, after the passing of this act, shall within any part of the United Kingdom of Great Britain and Ireland, falsely make, forge, or counterfeit, or cause

or procure to be falsely made, forged, or counterfeited, or knowingly aid or assist in the false making, forging, or counterfeiting any bill of exchange, or any promissory note, undertaking, or order for the payment of money, purporting to be the bill of exchange, promissory note, undertaking, or order for the payment of money, of any foreign prince, state, or country whatsoever, &c., &c., with intent, &c., whether such bill of exchange, &c., be in the English language, or in any foreign language or languages, or partly in one and partly in the other, or if any person, after the passing of this act, shall within any part of the said United Kingdom, tender in payment or exchange, or otherwise utter or publish as true, any such false, forged, or counterfeited bill of exchange, &c., knowing the same to be false, &c., with intent to deceive, &c., shall be deemed and taken to be guilty of felony, and being thereof lawfully convicted, shall be transported for any term of years not exceeding fourteen years. This section is evidently confined to the forging of bills made, or purporting to be made in a foreign country, leaving altogether unprovided for indorsements made, or purporting to be made, in this country; and there is an express saving at the end of section 2—"That nothing in this act contained shall extend, or be construed to extend, in any manner whatsoever, to repeal or alter any law or statute now in force for the prevention and punishment of the crime of forgery, in any respect whatsoever, in any part of the said United Kingdom." Here is an express legislative enactment that the 43 Geo. 3, shall not repeal any of the then existing forgery acts. That sends us back to inquire into the provisions of the previous act, and see what is there in the previous act to prevent indorsements being forged at home, by persons in the country. This does not depend on any abstract reasoning; and it is impossible to doubt but that the case in 1 Moo. C. C. 311 (*Kirkwood's case*), comes within the act of Parliament, 39 Geo. 3, c. 63, and puts an end to the doubts which existed in the minds of the judges, in the cases of *Rex v. Dick*, and *Rex v. M'Kay*. And Mr. Lewin, in his Crown Cases, puts *Kirkwood's case* properly—that the offence was complete in England, the forgery was in England, and the action might have been maintained upon the note, although that note was payable in Ireland. Since the argument was concluded in this case, Baron Greene has found a case in the Old Bailey Reports, 316 (*Ryland's case*), in which the prisoner was convicted for forging an indorsement on a bill, drawn in the East Indies, and payable in Ireland. And a civil case also, reported in 4 T. R. 78 (*Mead v. Young*), which was a case of a bill of exchange, transmitted from Dunkirk to London; the action was brought against the acceptor; Lord Kenyon, hurriedly at the trial, held, that because it was indorsed by Henry Davies, evidence could not be given to show that he was not the right person; the three other judges held that such opinion was wrong; and in the course of the judgment by Buller and Ashurst, J.J., they laid it down as clear law, that if the Henry Davies who indorsed the bill could have been caught, he would have

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been hanged for the forgery. We are here of opinion that, upon the true construction of the law, 39 Geo. 3, c. 63, the saving in the 43 Geo. c. 139, and also upon the general principle that an affirmative act does not impliedly repeal another existing act, this woman was properly convicted. I have omitted to make any reference to the 11 Geo. 4 & 1 Will. 4; but it appears to us that that act is clearly within our present decision. *Conviction affirmed.*

The prisoner was at the subsequent commission (Nov. 7th, 1857), sentenced by Mr. Justice Crampton to three years' penal servitude.

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COURT OF CRIMINAL APPEAL.

Hilary Term, 1857.

(Before MONAHAN, C.J., PERRIN, J., and GREENE, B.)

REG. v. BOYLE AND OTHERS. (a)

Residue—Poor's rate—Insufficient description—Rate book.

A. was indicted for the rescue of a distress from a collector of poor's rate. The name of the defendant did not appear in the rate, and there was no name or description of the parties liable to the payment of the rate in the appropriate column, except the general words, "tenants of common." The transcript of the rate book, to which the collector's warrant was annexed, was similarly defective. It was not disputed that A. was the occupier of the lands, and might have been rated as such:

Held, that under the above warrant the collector had no power to distrain the defendant's goods, and that the indictment could not, therefore, be sustained.

THIS was an indictment for rescue tried at the Dundalk Sessions in October last, before A. O'Hara, Esq., Deputy Assistant Barrister, who stated the following case for the opinion of the court:—

The traversers were indicted for rescuing, with force and arms, from the custody of John Farley, poor-rate collector, six cows

(a) We are indebted to *The Irish Jurist* for the Report of this Case.

which he had distrained on the Commons of Carlingford, in the county of Louth, on the 24th of May, 1856, for the sum of 17*s.* poor-rate, and 1*l.* 1*s.* 3*d.* arrears of poor-rate. The traversers pleaded "Not Guilty." At the trial James Murphy, the clerk of the Dundalk Union, proved that on the 14th February, 1856, a rate was made by the guardians of the union. He produced the rate-book, and proved the signatures to the rate made on the 14th February, 1856, of Michael Kelly, the chairman, and of James Treanor and of Peter Callan, two of the guardians of the union, and his (witness's) own signature as clerk of the union. He also produced a warrant dated 14th February, 1856, and proved the signatures of the same parties to such warrant, directed to John Farley, collector of poor-rates for Carlingford division of said union. The warrant was in these words:—"You are hereby authorized and directed to levy the several poor-rates in the annexed book set forth from the several persons therein rated, or other persons liable to pay the said rates and arrears of rates." An entry in the rate-book was then read, in which the occupiers were described merely as tenants "of Commons." John Farley, poor-rate collector, proved that he received the warrant so proved; that on the 24th day of May, 1856, he proceeded, with two assistants, to the Commons of Carlingford, to levy the sum of 17*s.* rate, and 1*l.* 1*s.* 3*d.* arrears of rate, making together the sum of 1*l.* 18*s.* 3*d.*; and that on the Commons of Carlingford he seized six cows, some sheep, and goats; that before he could make an inventory the cows, sheep, &c., were taken from him; that John Boyle, Patrick M'Shane, Anne Boyle, and others, in all to the number of at least twenty persons, forcibly took the cattle from him. John Boyle said they were his cattle, and that he would not let the witness take them. The people were all around witness. The witness was afraid to go any further with the cattle, and was obliged to leave them. The place on which the distress was made was the open ground or Commons of Carlingford mentioned in the warrant. Witness stated that there are 270 housekeepers named in the warrant, who claim a right of commonage on the land; and that there are 218 persons living on the Common who have cottages or gardens on the Common, fenced and enclosed from the remainder of the Common, for which holdings they are rated separately. The traverser, John Boyle, is one of those 218 persons, and lives on the Common in a separate holding, for which he is rated separately; and he also claims a right of commonage in the land or open ground on which the distress was made. Upon the close of the case Messrs. M'Kenna and M'Mahon, the attorneys concerned for the traversers, called upon the court to direct the jury to acquit the traversers on the ground that there was no valid rate struck, inasmuch as there was no person named therein as immediate lessor, nor as occupier, and inasmuch as under the column "occupier" the entry in the rate-book was an insufficient description. The court refused to direct an acquittal, and directed the jury to assume that the warrant was

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sufficient, that the rate was legal, and that, therefore, the cattle were in legal custody. The jury found the traversers guilty, and sentence was deferred until the decision of the Court of Appeal should be ascertained as to the validity of the rating.

Hamill, for the traversers, contended that the warrant was insufficient for want of certainty, inasmuch as it gave no information with respect to the party liable to distress, and he distinguished the case from those of *R. v. Westrop* (2 Ir. C. L. R. 219), and *R. v. Higgins* (2 Ir. C. L. R. 213.)

Coiballis, Q. C. *contrà*.—The uncertainty in the present case is no greater than in *R. v. Higgins*, where it was held that “representatives of J. K.” was a good description. [PERRIN, J.—Is not the rate imposed on the person in respect of the property occupied? MONAHAN, C. J.—What is there in the act which excuses the giving of a description in the warrant of the occupier?] In *R. v. Brennan* (6 Cox Crim. Cas. 381), it was held by this court, that in order to support an indictment for rescue the making of the rate need not be proved. *R. v. Fordham* (11 Ad. & El. 73.) [GREENE, B.—That was an appeal against the rate, and there the dispute was whether the whole rate was vitiated. Here the question is not whether the whole rate is void. What is there on the face of the warrant to show a right to seize the goods of any party?] In *R. v. Westrop* the party originally named in the rate was dead.

MONAHAN, C. J.—We are of opinion that the collector here had no right to make the seizure, inasmuch as the rate-book must give a description of the occupiers, and the words “tenants of commons” do not amount to a proper description.

Conviction quashed.

COURT OF CRIMINAL APPEAL.

January 23, 1858.

(Before all the Judges except BRAMWELL, B.)

REG. v. BENITO LOPEZ. (a)

REG. v. CHRISTIAN SATTLER. (a)

Offences committed on the high seas by foreigners on board English ships
—Jurisdiction of English courts—Stat. 18 & 19 Vict. c. 91, s. 21.

A foreigner on board a British ship on the high seas owes allegiance to the law of England, and if he commits an offence against that law, he is triable under the stat. 18 & 19 Vict. c. 91, s. 21, by any court of justice in her Majesty's dominions, within the jurisdiction of which he may, at the time of the indictment, happen to be, provided that such court would have had cognizance of the crime if committed within the limits of its ordinary jurisdiction.

And it makes no difference in this respect whether the offender comes voluntarily on board the British ship or is brought and detained there against his will; nor whether he comes voluntarily within the jurisdiction of the particular court by which he is tried, or is brought within that jurisdiction against his will.

Where therefore a foreigner, being a sailor and one of the crew of a British ship, maliciously and unlawfully wounded another foreigner, who was also a sailor and one of the crew of the same ship, in the same ship whilst on the high seas, and was brought to England to be tried for that offence:

Held, that the court of oyer and terminer and general gaol delivery for the county of Devon, where the accused was in custody, had jurisdiction to try him under stat. 18 & 19 Vict. c. 91, s. 21.

And where a foreigner, having committed larceny in England, was followed to Hamburg by an English police-officer, who arrested him without a warrant, and brought him against his will on board an English steamer trading between Hamburg and London, and there kept him in custody in order that he might be tried for the larceny in England: the foreigner having shot the officer during the voyage, and whilst the steamer was on the high seas, under such circumstances

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

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that if the killing had been by an Englishman in an English county, the offence would have been murder :

Held, that the Central Criminal Court had jurisdiction under 18 & 19 Vict. c. 91, s. 21, to try the foreigner for the murder of the police-officer.

THE two cases of Benito Lopez and Christian Sattler were separately reserved and separately argued; but, as the same question of jurisdiction arose in both of them, one judgment only was delivered.

THE CASE OF BENITO LOPEZ.

This case was reserved by Crompton, J., as follows :—

The prisoner was tried before me at the Summer Assizes, 1857, at Exeter, on an indictment charging him with feloniously wounding George Smith, with intent to do him some grievous bodily harm; and was found guilty of unlawfully wounding, and sentenced to two years' imprisonment with hard labour. It was proved at the trial that the prisoner, a foreigner, being a sailor, and one of the crew of the British ship *Ontario*, maliciously and unlawfully wounded the prosecutor, also a foreigner and a sailor, and one of the crew of the same ship, whilst on the high seas, and in the said ship, on a voyage from London to the coast of Africa.

I reserved for the consideration of the court the question, whether the prisoner, a foreigner, was properly convicted of the offence committed on the high seas.

Stat. 18 & 19 Vict. c. 91, s. 21, enacts: "If any person being a British subject charged with having committed any crime or offence on board any British ship on the high seas, or in any foreign port or harbour; or if any person, not being a British subject, charged with having committed any crime or offence on board any British ship on the high seas, is *found* within the jurisdiction of any court of justice in Her Majesty's dominions, which would have cognizance of such crime or offence if committed within the limits of its ordinary jurisdiction, such court shall have jurisdiction to hear and try the case as if such crime or offence had been committed within such limits: provided that nothing contained in this section shall be construed to alter or interfere with the act 12 & 13 Vict. c. 96."

Ballantine, Serjt., for the prisoner.—The question of jurisdiction is an important one; and it depends in part upon the general law of nations, and in part upon the recent stat. 18 & 19 Vict. c. 91, s. 21. Unless that statute gave jurisdiction, the court at Exeter had no authority to try this prisoner.

COCKBURN, C. J.—You must not assume that a foreigner committing an offence on board a British ship on the high seas is not amenable to English laws.

Ballantine, Serjt.—That is a matter much considered by writers on international law; but that question refers only to the general jurisdiction of the Admiralty over offences committed on the high seas, and not to the special jurisdiction conferred by statute upon

any tribunal in this country. First, however, with respect to the stat. 18 & 19 Vict. c. 91, s. 21, two points arise. One is, that the case reserved does not state that the prisoner was found within the jurisdiction of the court.

LORD CAMPBELL, C. J.—He was tried at Exeter. He must, therefore, have been found in the county of Devon.

Ballantine, Serjt.—Then that raises the other point, whether within the meaning of this statute a man can be said to be *found* within the jurisdiction of a court, if he is brought within it by force and against his will. So to hold would go far to abrogate all distinctions of jurisdiction.

COCKBURN, C. J.—Then you contend, supposing him to be amenable to British laws, that this statute applies only to the mode and place of trial, and that the present case is not brought within it.

Ballantine, Serjt.—The statute gets rid of a difficulty which would arise as to the trial of a man who had escaped, but was afterwards *found* in some English county.

MARTIN, B.—I rather think that we ought to know whether the prisoner came voluntarily on board the ship or not. If he went on board voluntarily, the case might admit of a different consideration from that which it ought to receive if he was forced on board on the coast of Africa.

CROMPTON, J.—He was one of the crew; and we cannot imply that any force was used to bring him there.

Ballantine, Serjt.—It is not suggested that any force was used to bring him on board the ship in the first instance; but if, after the commission of the offence, he was detained and brought to England in custody, then it is submitted that he was not “found” within the jurisdiction of the court which tried him.

WIGHTMAN, J.—You mean then that he must have been first “lost” before he can be found.

Ballantine, Serjt.—Yes. If he escapes and afterwards is found at any place in England, where by the law as it previously stood he could not be tried, jurisdiction is by the statute given to the particular tribunal of that locality.

COCKBURN, C. J.—Surely if the object of the Legislature was to get rid of any difficulty about the trial of offences committed on the high seas, the section must apply to persons committing such offences and detained and brought here for trial.

Ballantine, Serjt.—There would be no necessity for the provision as to British subjects, if that effect is to be given to it.

COLERIDGE, J.—By the Customs Laws Consolidation Act (16 & 17 Vict. c. 107, s. 275), it is enacted “that where any offence shall be committed in any place upon the water not being within any county of the United Kingdom, or where the officers have any doubt whether such place is within the boundaries or limits of any such county, such offence shall for the purposes of this act be deemed and taken to be an offence committed on the high seas; and for the purpose of giving jurisdiction under this act every offence shall be deemed to have been committed, and every cause

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of complaint to have arisen either in the place in which the same actually was committed or arose, or in any place on land *where the offender or person complained against may be or be brought.*" Is any different effect to be given to the words "where the offender is found?"

Ballantine, Serjt.—The word "found" in 18 & 19 Vict. c. 91, s. 21, is equivalent to the words "may be" in the statute just cited; but the words "or be brought" would carry the meaning further.

MARTIN, B. referred to 12 & 13 Vict. c. 96.

LORD CAMPBELL, C. J.—But under the stat. 28 Hen. 8, c. 15, the Crown has the power of issuing a special commission into any English county for the trial of offences committed on the high seas.

Ballantine, Serjt.—That applies only to British subjects, not to foreigners.

COCKBURN, C. J.—Unless foreigners on board of British ships are amenable to British laws.

Ballantine, Serjt.—That is the next and more general question in this case; and it is submitted that neither under any provision of our Legislature nor at common law can a foreigner be tried in England for an offence committed within the jurisdiction of the Admiralty. By the stat. 28 Hen. 8, c. 15, treasons, murders, robberies, and felonies of the like aggravated kind when committed upon the high seas, within the jurisdiction of the Admiralty of England, were to be tried in such shire of the realm as should be specially limited for that purpose by the king's commission. By the 39 Geo. 3, c. 37, the provisions of that statute were extended to all offences committed on the high seas. The 4 & 5 Will. 4, c. 36, s. 22, gives jurisdiction to the Central Criminal Court over offences committed on the high seas; and 7 & 8 Vict. c. 2, s. 1, gives the like jurisdiction to any court of oyer and terminer or general gaol delivery. But the question is, whether these statutes apply to foreigners. They do not in terms include any but British subjects; and the only way in which it can be suggested that they bind foreigners committing offences on British ships is, that those who come on board British ships thereby become liable to render a qualified allegiance to the Queen, and a temporary obedience to British laws. But it seems unreasonable to hold that a foreigner by merely coming on board a British ship incurs such a liability. The 39 Geo. 3, c. 37, extends to all offences against the municipal law of England; so that a foreign woman concealing the birth of a child on board a British vessel might be tried and convicted in an English court of that offence, though the same facts would not, according to the law of her own country, constitute any offence at all. Again, if a British vessel takes a foreigner on board at one foreign port to be disembarked at another, may he, if he commits an offence against the municipal law of England during his passage, be tried and convicted by an English court, though according to the law of the country from which he sailed and that of the country to which he was bound, he had committed no offence? It is laid down by eminent writers that jurisdiction depends on

territory ; and the question is, whether there is a territorial jurisdiction over all persons on board English ships. Story, in his Conflict of Laws, sect. 19, citing Boullenois, says : " The sovereign has also a right to make laws to govern foreigners in many cases ; for example, in relation to property, which they possess within the reach of his sovereignty ; in relation to the formalities of contracts, which they make within his territories ; and in relation to judiciary proceedings if they institute suits before his tribunals. The sovereign may, in like manner, make laws for foreigners, who even pass through his territories ; but these are commonly simple laws of police, made for the preservation of order within his dominions." Again in sect. 20 : " Another maxim or proposition is, that no state or nation can, by its laws, directly affect or bind property out of its own territory, or bind persons not resident therein, whether they are natural born subjects or others. This is a natural consequence of the first proposition ; for it would be wholly incompatible with the equality and exclusiveness of the sovereignty of all nations, that any one nation should be at liberty to regulate either persons or things not within its own territory." Further in ss. 539, 541, he adds :—" Considered in an international point of view, jurisdiction to be rightly exercised, must be founded either upon the person being within the territory or upon the thing being within the territory ; for, otherwise, there can be no sovereignty exerted, upon the known maxim, *Extra territorium jus dicenti impune non paretur*. Boullenois puts this rule among his general principles. The laws of a sovereign rightfully extend over persons who are domiciled within his territory, and over property which is there situate. Vattel lays down the true doctrine in clear terms : ' The sovereignty ' says he, ' united to domain, establishes the jurisdiction of the nation in its territories, or the country, which belongs to it. It is its province, or that of its sovereign, to exercise justice in all places under its jurisdiction, to take cognizance of the crimes committed, and the differences that arise in the country.' On the other hand, no sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals : (s. 539.) In regard to foreigners resident in a country, although some jurists deny the right of a nation generally to legislate over them, it would seem clear, upon general principles of international law, that such a right does exist ; and the extent to which it should be exercised, is a matter purely of municipal arrangement and policy. Huberus lays down the doctrine in his second axiom : ' All persons who are found within the limits of a government, whether their residence is permanent or temporary, are to be deemed subjects thereof : ' (s. 541.) In Wheaton's Elements of International Law (3rd ed. p. 157 ; 4th ed. p. 174), the following propositions are stated :—" The judicial power of every independent state, then, extends with the qualifications mentioned :

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First, To the punishment of all offences against the municipal laws of the state by whomsoever committed within the territory. Secondly, To the punishment of all such offences, by whomsoever committed, on board its public and private vessels on the high seas, and on board its public vessels in foreign ports. Thirdly, To the punishment of all such offences by its subjects wheresoever committed. Fourthly, To the punishment of piracy and other offences against the law of nations by whomsoever and wheresoever committed." But that statement is at variance with the doctrine laid down in Kent's Commentaries (vol. 1, pt. 1, lect. 2), where it is said: "No nation has any right of jurisdiction at sea, except it be *over the persons of its own subjects*, in its own public and private vessels:" unless that is to be considered as qualified by what follows: "and so far territorial jurisdiction may be considered as preserved, for the vessels of a nation are, in many respects, considered as portions of its territory, and persons on board are protected and governed by the laws of the country to which the vessel belongs. They may be punished for offences against the municipal laws of the state committed on board its public and private vessels at sea, and on board of its public vessels in foreign ports:" (p. 26, 4th ed. 1840; p. 29, ed. 1851.) It is, however, submitted that the intention of the author is to be gathered from the general proposition stated at the commencement of the passage.

COCKBURN, C. J.—There is another passage later in the book (p. 363, ed. 1840; p. 394, ed. 1851) which explains his meaning. After referring to two Acts of Congress of 1790 and 1825 noticing the diversity of language in different sections, and the consequent want of precision on the subject of the criminal jurisdiction of the Admiralty over crimes committed on the high seas, he says: "We may safely say that so far as any crime committed upon the high seas, no matter by whom or where, amounts to piracy within the purview of the law of nations, there can be no doubt of the jurisdiction of the circuit courts of the United States. But where the crime has not attained that 'bad eminence,' then the jurisdiction can only, upon proper principles, attach to crimes committed by American citizens upon the high seas *or to crimes committed in or upon an American vessel upon the high seas*. If the American citizen commits the crime on the high seas, on board of a foreign vessel, the personal jurisdiction over the citizen in that case, if it exist at all, must be concurrent with the jurisdiction of the foreign governments to which the vessel belongs, or by whose subjects it is owned. Under the 8th section of the Act of April, 30, 1790, if an offence be committed on board of a foreign vessel by a citizen of the United States, or on board of a vessel of the United States by a foreigner, or by a citizen or foreigner on board of a piratical vessel, it is cognizable by the courts of the United States: (*United States v. Holmes*, 5 Wheaton, 412.)"

Ballantine, Serjt.—It cannot be denied that there are English as well as American decisions supporting that view. In *Forbes v. Cochrane* (2 B. & C. 448), where one of the questions was whether slaves

became free as soon as they were on board a British vessel, there are several passages in the judgment of Best, J., in which a British ship is likened to British territory. In the course of it, he said: "These men, when on board an English ship, had all the rights belonging to Englishmen and were subject to all their liabilities. If they had committed any offence they must have been tried according to English laws. If any injury had been done to them they would have had a remedy by applying to the laws of this country for redress" (p. 467); and again, "so far as this question is concerned, there is no difference between an English ship and the soil of England; for are not those on board an English ship as much protected and governed by the English laws as if they stood upon English land?" But in the case of *R. v. Depardo* (1 Taunt. 26), it was held that a manslaughter, committed in China by an alien enemy who had been a prisoner of war and was then acting as a mariner on board an English merchant ship, on an Englishman, cannot be tried here under a commission issued in pursuance of the statutes 33 Hen. 8, c. 23; 43 Geo. 3, c. 113, s. 6.

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COCKBURN, C. J.—In that case information is given of three cases, in which, if your doctrine be correct, the prisoners were wrongfully convicted. The cases of *François Antoine Sauvajot*, *Jean Prevôt*, and *Acow*, mentioned in p. 32, were all of them cases of foreigners tried and convicted in England of offences committed on board of English ships on the high seas.

Ballantine, Serjt.—There is certainly a considerable weight of authority in support of the position expressly laid down by Wheaton, but there is no direct decision of an English court upon the question; and on the score of justice to foreigners, who cannot be presumed to know English law though they may happen to be in an English ship, there appear strong reasons against the adoption of that position. (He also referred to *R. v. De Mattos*, 7 Car. & P. 458.)

Welsby (with him Sir *H. S. Keating* (Solicitor-General) and *M. Bere*), for the Crown.—The jurisdiction of the court at Exeter to try the prisoner does not depend upon the stat. 18 & 19 Vict. c. 91, s. 21; for if the prisoner was amenable to British law at all, he was triable there by virtue of the stats. 28 Hen. 8, c. 15, and 7 & 8 Vict. c. 82; but if the case depended wholly upon the 18 & 19 Vict. c. 91, s. 21, the jurisdiction is clear; because the word *found* is used there in its most extensive sense, and was intended to include all cases by giving jurisdiction to try at any place where the prisoner might happen to be at the time of trial. The object was to get rid of all question about local jurisdiction; and *R. v. Smythies* (4 Cox Crim. Cas. 94), and *R. v. Whyllie* (2 Moo. C. C. 186), though decided upon other statutes using rather different words, support that construction.

COCKBURN, C. J.—Was he in the place willingly, or taken there *invitus*?

Welsby.—He surrendered in discharge of his bail.

LORD CAMPBELL, C. J.—We think you may pass to the other point.

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Welsby.—The only other question is whether the prisoner was amenable to British law at all; and upon that there is no room for doubt. The authorities already cited are sufficient to show that the deck of a British vessel is, for the purposes of jurisdiction over criminal offences, part of the British territory. But there are many other authorities to the same effect. Vattel, lib. 1, c. 19, s. 216, so lays it down; and Fœlix (s. 506) likewise speaks of every ship as being considered a continuation of the territory of country to which it belongs. The American decisions are also expressly in point. In *The United States v. Palmer* (3 Wheaton, 610), the point decided was, that the crime of robbery, committed by a person who is not a citizen of the States on the high seas on board of a ship belonging exclusively to subjects of a foreign state, is not piracy under the Act of 1790, c. 36, and is not punishable in the courts of the United States. In the judgment delivered by Marshall, C. J., it is said: "Do the words of the act authorize the courts of the Union to inflict its penalties on persons who are not citizens of the United States, *nor sailing under their flag*, nor offending particularly against them?" (p. 631); and again, "But it cannot be supposed that the Legislature intended to punish a seaman on board a ship sailing under a foreign flag, under the jurisdiction of a foreign government, who should lay violent hands upon his commander, or make a revolt in the ship. These are offences against the nation under whose flag the vessel sails, and within whose particular jurisdiction all on board the vessel are:" (p. 632.) In *The United States v. Holmes* (5 Wheat. 412), Washington, J., delivering the judgment of the court, said: "If the offence be committed on board of a foreign vessel by a citizen of the United States or on board of a vessel of the States by a foreigner, the offender is to be considered, *pro hac vice*, and in respect to this subject, as belonging to the nation under whose flag he sails." (He also cited Ortolan, *Diplomatie de la Mer*, (b) liv. 2, c. 10, and *R. v. Serva*, 1 Cox Crim. Cas. 292)

Ballantine, Serjt., in reply, relied upon the passage above cited from Kent's Commentaries.

Lord CAMPBELL, C.J.—We will now hear the case of Christian Sattler argued. *Cur. ad. vult.*

(b) Ortolan, liv. 2, c. 10: "On dit que tout bâtiment de guerre est une partie des territoire de la nation à laquelle il appartient:" (p. 212.)

"Cela posé, si le navire est en pleine mer, qu'il soit bâtiment de commerce ou bâtiment de guerre, peu importe, nul état étranger n'a le droit de s'immiscer en rien dans son régime intérieur ou extérieur, de lui donner des ordres ou de lui faire des prohibitions, de le soumettre à une puissance ou à une juridiction étrangère quelconque: il est placé uniquement sous l'empire des lois et sous le gouvernement du pays qui le couvre de sa nationalité; toute relation qu'un navire étranger aurait avec lui est une relation internationale, qui doit être conforme à la coutume ou consentie par les traités:" (p. 214.)

"L'assimilation du bord d'un navire marchand au territoire de sa nation, exacte lorsque ce navire est au large, parcequ'alors, comme corollaire de la liberté de la pleine mer, il est totalement exempt de toute juridiction autre que celle de sa nation, cette assimilation ne peut donc plus être admise dès qu'il se trouve sur une rade ou dans un port appartenant à une puissance étrangère:" (p. 227.)

CHRISTIAN SATTLER'S CASE.

The following case was stated and reserved by Martin, B.:

I request the opinion of the Justices of the Court of Queen's Bench and Common Pleas, and the Barons of the Court of Exchequer upon the following case:—

The prisoner was a foreigner. On the 2nd of November, 1857, he committed a larceny, at St. Ives, in Huntingdonshire, and went away from England with part of the stolen property to Hamburg.

The owner of the property gave information to the London police, and the deceased, who was a detective officer of that force, and an English subject, proceeded to Hamburg, and there, with the assistance of the Hamburg police, arrested the prisoner, and brought him, against his will, on board an English steamer, trading between Hamburg and London, in order that he might be tried for the larceny.

Hamburg is on the river Elbe, 60 miles from the sea, but the tide flows higher up than the place where the steamer was when the prisoner was taken on board. The steamer left Hamburg on the morning of the 21st of November, the prisoner being in irons; and on the 22nd, whilst the steamer was on the high seas, he shot the officer, who afterwards died of the wound. If the killing had been by an Englishman, in an English county, it would have been murder. The deceased had no warrant.

The question which I desire to be answered is:—

Whether there was any jurisdiction to try the prisoner at the Old Bailey sessions?

If the answer be in the affirmative, the judgment which has been already given is to be affirmed.

If in the negative, the judgment is to be reversed; but the prisoner is to remain in custody, to be tried on the indictment, which has been found by the grand jury, for the larceny.

I also request, for my own guidance, the opinion of the Judges upon the following questions:—

First. Was the custody of the prisoner on board the steamer lawful? and, is there any distinction as to the times, whilst the steamer was on the river Elbe and whilst she was upon the high seas?

Second. Supposing the custody not to have been lawful, was the killing necessarily only manslaughter?

SAMUEL MARTIN.

Ballantine, Serjt., for the prisoner.—There is this important distinction in this case, that the original capture of the prisoner was unlawful, and he was taken on board the British ship both unlawfully and against his will. Under such circumstances a man may go great lengths to achieve his liberty: (*Stevenson's case*, 19 St. Tri. 846.)

Lord CAMPBELL, C. J.—But it must be taken upon this case that he killed the officer not to obtain his liberty, but maliciously

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out of revenge; in which case it is murder, though the custody may have been unlawful.

Ballantine, Serjt.—Still, if a man is dragged illegally on to British ground, he does not thereby become a British subject.

Sir *H. S. Keating*, S. G., for the Crown.—The distinguishing point relied upon in this case will not affect the decision; because, assuming the deck of a British vessel to be British territory, it cannot be maintained that a person who is brought there against his will is not subject to English law. The cases of prisoners of war (three of which are cited in *R. v. Depardo*), who have been convicted of offences in this country, are decisive on that point; and the distinction respecting prisoners of war mentioned in *R. v. Serva* (1 Cox Crim. Cas. 292), is founded upon a misapprehension of the true ground upon which allegiance is due: (*Calvin's case*, 7 Rep. 6.) (He also referred to the *Canadian prisoners' case*, 9 Ad. & Ell. 731; 5 M. & W. 32.)

MARTIN, B.—Is there any distinction between a vessel on the river Elbe and the town of Hamburgh?

Sir *H. S. Keating*.—As it is a place where big ships go, the jurisdiction is the same as if the vessel had been upon the high seas: (*R. v. Allen*, 1 Moo. C. C. 494.)

Ballantine, Serjt., in reply.—Except in the case of prisoners of war, as to whom there may be some ground of exception, it is at variance with the principles, upon which allegiance of any kind rests, to hold that a person brought into and detained in a foreign country by compulsion owes any obedience to the laws of that country: (Vat. 172, s. 101.)

The Judges then retired for a short time for consultation, and upon their return:—

Lord CAMPBELL, C. J., delivered the judgment of the court.—We think that in both cases the convictions must be affirmed. (His Lordship then read the case of *Benito Lopez*.) Now we have no doubt that an offence was committed by him against the law of England. He was in an English ship under the protection of English law; he owed obedience to that law; and he was guilty of an offence against English law by the crime which he committed. It is unnecessary to enter into the authorities which have been cited to prove that proposition; but it is satisfactory to know that such is also the law in America and France. The only other question is, whether there was jurisdiction in the court at Exeter, sitting under the commission of oyer and terminer and general gaol delivery for the county of Devon, to try that offence; and upon that we entertain as little doubt; because that court would have had jurisdiction before the late act 18 & 19 Vict. c. 91, s. 21; and that act is itself quite conclusive on the subject, and was enacted for the purpose of removing any doubts which might by possibility be suggested upon the subject. It provides that offences committed by foreigners in British vessels on the high seas may be tried by any court, within the jurisdiction of which the offender is found, if the offence is one which would have been

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cognizable by such court, supposing it to have been committed within the limits of its ordinary jurisdiction. Here the offence, if committed in the county of Devon, would certainly have been triable at the assizes at Exeter; and as the prisoner was found there, it is clear that the court had jurisdiction to try his offence. In the case of Sattler we are equally clear that, though he was a foreigner, he committed an offence against the law of England. (His Lordship read the case.) Here then is a crime committed by a foreigner on board an English ship, which would have been murder if committed by an Englishman in England. Under the circumstances stated we are of opinion that, whether his detention was lawful or unlawful, and whether he was or not in legal custody at first, he was guilty of murder and amenable to the English laws. He was in a British ship entitled to the protection of English law, and therefore subject to it; and it seems to us for this purpose immaterial whether the capture at Hamburgh was lawful or not. He was on board a British ship, which is for this purpose to be regarded as British territory; he owed allegiance to the law of England; and he committed an offence against that law because he shot the detective officer, not to obtain his liberty but from motives of revenge. Then the question arises, whether the Central Criminal Court had jurisdiction. Upon that I have already said that we are clearly of opinion that the prisoner was "found" within the jurisdiction. My brother Ballantine contended that if the prisoner was brought within the jurisdiction against his will, he was not found there within the meaning of the act; but we are all of a contrary opinion; and we think that a man is "found," within the meaning of that act, in any place where he is actually present. In answer to the first question, therefore, we are all of opinion that the court had jurisdiction. We are then asked whether the custody of the prisoner was lawful on board the steamer, and whether there is any distinction as to the times when she was on the Elbe and when on the high seas; but we think it unnecessary to answer these questions, as it must be taken that the prisoner did the act out of malice and revenge. We have no doubt that the conviction was perfectly right, and without hesitation answer to the third question, that even if the custody was not lawful the killing was not necessarily only manslaughter. If the killing was out of malice and revenge, and not for the mere purpose of obtaining liberty, then, though the custody were unlawful, the crime would still be murder.

Conviction affirmed.

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GUILDHALL.

COURT OF QUEEN'S BENCH.

(Before Lord CAMPBELL, C. J., and a Special Jury.)

February, 1858.

REG. v. BROWN AND OTHERS.

*Conspiracy by directors of a joint stock bank to defraud the public by false representations.**The directors of a joint stock bank, knowing it to be in a state of insolvency, issued a balance-sheet showing a profit and thereupon declared a dividend of 6 per cent. They also issued advertisements inviting the public to take shares upon the faith of their representations that the bank was in a flourishing condition.**On an ex officio information filed by the Attorney-General, they were found guilty of a conspiracy to defraud. (a)*

THIS was an information filed by the Attorney-General, Sir R. Bethell, charging certain directors of the Royal British Bank—viz., Humphrey Brown, Edward Esdaile, Henry Dunning Macleod, Loran de Wolfe Cochran, Richard Hartley Kennedy, William Daniel Owen, John Stapleton, and also the general manager, Hugh Innes Cameron, with conspiring, by false representations, to defraud the shareholders and customers and the public.

The trial began on the 13th, and was brought to a close on the 27th of February, after having occupied thirteen days, for about eight hours each day. During the first eight days, the case on the part of the Crown was conducted by Sir F. Thesiger, but that gentleman having in the meantime been raised to the dignity of Lord High Chancellor, the conduct of the prosecution during the remaining five days devolved on Mr. Atherton.

(a) I have thought it desirable to preserve a record of this remarkable case, which may become a precedent; but considering it unnecessary to detail the evidence, I have given only the summing up of the Lord Chief Justice, which very clearly lays down the law of conspiracy, and presents a sufficient summary of the facts proved, and which were held to bring the defendants within the grasp of the law. I am indebted to *The Times* for this report.—EDITOR.

Sir *F. Thesiger*, *Atherton*, Q.C., *Ballantine*, Serjt., *Welsby*, and *Brown*, J. appeared on the part of the Crown.

Huddleston, Q.C., *Kennedy*, C. R., and *Bell* for Brown.

Edwin James, Q.C., and *Aspland* for Esdaile.

Lawrence for Macleod.

Cochran, who had not pleaded, did not appear.

Shee, Serjt., *Keane*, D. D., and *Jacobs* appeared for *Kennedy*.

Slade, Q.C. for Owen.

Sir *F. Kelly*, *Bovill*, Q.C., and *Coleridge* for Stapleton.

Digby Seymour and *Bennett* for Cameron.

The 1st count of the information charged a conspiracy to publish and represent to such of the shareholders as were ignorant, &c., that the bank and its affairs had been during the half-year ended the 31st of December, 1855, and then were, in a sound and prosperous condition, producing profits divisible, &c., the defendants well knowing the contrary, &c., with intent to deceive and defraud such of the shareholders as were not aware of the true state of its affairs, and to induce them to continue to hold shares therein, and to become or continue customers and creditors of the bank. The count then set out the following overt acts:—

1st overt act.—Publishing a false report for the half-year to December 31, 1855, declaring a dividend of 6 per cent., and that new shares would be issued at a premium.

2nd overt act.—Issuing new shares, knowing the bank to be in a failing condition.

3rd overt act.—Publishing a false balance-sheet for the year, false in the amount of assets, in the provision for bad debts, and in the profit and loss account.

4th overt act.—Paying a dividend when no profits were made.

5th overt act.—Buying the bank shares with the bank's money to keep up the price.

6th overt act.—Publishing a circular, September 10, 1855, to the shareholders, to induce them to buy new shares, when the bank was in a failing condition.

7th overt act.—Publishing an advertisement inviting persons to open accounts when the bank was approaching insolvency.

8th overt act.—Publishing an issue of 2,000 more shares when the bank was failing.

The 2nd count charged a similar conspiracy against customers and creditors of the bank, and contained seven overt acts similar to numbers 1 to 7 in the 1st count.

The 3rd count charged a similar conspiracy against the Queen's subjects generally. The overt acts were the same as in the 1st count.

The 4th count charged a conspiracy to cheat and defraud such of the shareholders as were ignorant of the true state of the bank by inducing them, by false pretences, to purchase and hold additional shares in the bank, the defendants knowing the bank to be in a bad and dangerous condition and approaching insolvency, and that the shares were unsafe and might be ruinous to the holders. The overt acts were the same as Nos. 1 to 5 in the 1st count.

The 5th count charged a similar conspiracy against the Queen's

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subjects generally. The overt acts were the same as Nos. 4, 5, and 7 in the 1st count.

The 6th and last count charged a general conspiracy to cheat and defraud John Arundel, and several other persons named, of their money.

Lord CAMPBELL thus summed up :—The anxious task now devolves upon me of summing up in this very important case ; and I say it most unaffectedly, my anxiety is greatly diminished when I consider the character and qualifications of the gentlemen whom I have now to address. If it had been my duty to try this case in the country, at the assizes, before country gentlemen and farmers, I should have been much more embarrassed. I should have probably known more than the jury, and it would have been my difficult and anxious task to try to communicate information to them on matters of which they would be ignorant. But, gentlemen, you know much more of this subject than I do ; and it is a satisfaction to me that you are so well qualified, and that justice is sure to be done by your verdict. During this long and laborious trial (and we have now arrived at the thirteenth day) you have devotedly attended to the evidence, and it seems to me that you thoroughly understand it. My task is, therefore, comparatively a light one, and I shall only feel it my duty to state the questions of law which may arise, and to direct your attention to what I consider to be the principal questions for your determination. It was my fate, gentlemen, in another case, to be occupied two days in summing up ; and justice so required ; and, if I thought that I could at all assist you by going through the whole of my notes, page by page, I would not spare myself the labour of completing that task. But I think that on this occasion, instead of assisting you, such a course would rather perplex you ; and that I shall best discharge my duty by bringing before you a few plain points, and stating the questions which you will have to consider. Gentlemen, this information was filed by the late Attorney-General (Sir R. Bethell) a gentleman of great learning and high honour, who filled the office of Attorney-General with great distinction ; and whatever may be the event of this prosecution, no one can ascribe the smallest blame to him for the course which he adopted. After the failure of the Royal British Bank, and the ruin and scandal which it caused, it became essentially necessary that an inquiry should take place, and he has put the defendants upon their trial. This is an *ex officio* information. Generally speaking, before a person can be put upon his trial in England, there must be a bill of indictment found by a grand jury, and so it is universally as to felony and high treason. But, in regard to misdemeanors, the Attorney-General has the right *ex officio* to file an information. This is an ancient and undoubted prerogative, and quite constitutional and beneficial, and I have heard no complaint on the part of the counsel for the defendants, of the course which has been adopted. Gentlemen, this information charges, in the first count, that the defendants conspired together to represent to the shareholders that the Royal British Bank and its affairs had been during the half-year ended the 31st of December, 1855, and then were, in a sound and prosperous condition, producing profits divisible among the shareholders, they well knowing the contrary, with intent to deceive and defraud the shareholders, customers, and creditors of the bank. This is the conspiracy charged. Then there are several overt acts alleged, the principal of which are the report of the directors to the shareholders of the state of the bank on the 31st of December, 1855, the issuing of new

shares, the balance-sheet, of which you have heard so much, which professes to give a true account of the condition of the bank at that time, showing they could give a dividend of 6 per cent. out of the supposed profits, buying the bank shares with the bank's money for the purpose of keeping up the deceit, &c. It has already been stated that by the law of England the crime of conspiracy may be completed without any overt acts committed; but it has been properly stated by the learned counsel (Mr. Atherton) who has latterly so very ably conducted the prosecution that the overt acts are properly to be looked to, because from them the jury may draw an inference as to the object of the conspiracy. With regard to conspiracy, it is not essential that evidence should be given of any formal consultation, in which the parties are supposed to have deliberately resolved to do an illegal act or to do a legal act by illegal means; but if, as reasonable men, you see there was a common design, and they were acting in concert to do what is wrong, that is evidence from which a jury may suppose that a conspiracy was actually formed. Now, gentlemen, the manner in which it was proposed to show that there was a conspiracy in this case was—first, to show that the bank was in a state of insolvency at the end of the year 1855 and beginning of 1856; secondly, that this was known to the defendants; and, thirdly, that, knowing that, they entered into the design to represent that the bank was then in a flourishing condition, for the purpose of deceiving those who were shareholders, or the public who might wish to become shareholders. It is for you to say whether, on the part of the prosecution, they have established those three points. I must caution you against supposing that, if one or several have done what was improper, that will establish the charge against them. For instance, if they went on after the “reserve fund” was exhausted, that alone will not establish the charge. The charge is, that they conspired to misrepresent the actual state of the bank for the purpose of deceiving the shareholders, and to establish that there must be a joint design, a joint combination and conspiracy. In addressing you, I shall first call your attention, to whether there has generally been such a conspiracy as is alleged on the part of the Crown; and then I will draw your attention particularly to the cases of the different defendants. I have already (in the course of the trial) had occasion to advert to the fact that there is considerable difference with regard to the evidence against the several defendants, to which you have attended in so exemplary a manner, and it will be your duty to distinguish between them. The great point is what was the real state of the bank on the 31st December, 1855? According to the balance-sheet published by the directors to the proprietors on the 1st of February, 1856, it was in a very flourishing condition. You have all copies of the report and balance-sheet, and it is essential that you should continue to look at them. If that balance-sheet be true, the case for the prosecution fails altogether; for on the part of the prosecution they undertake to prove that it is false and fraudulent, and particularly that it takes credit for a number of debts absolutely desperate, so as entirely to misrepresent the actual condition of the bank. There was notice given on the part of the Crown to the defendants of a great number of debts, but they are now confined to a certain number, which we have been engaged many days in investigating. I did not complain of that, but the exact amount of the debts was not material, nor the manner in which they were incurred, for we were not trying the directors for improvidently allowing those with whom they were dealing to incur debts. We

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are to examine what was the condition of the bank at the time to which I have referred. I shall therefore spare you the history of the Welsh mines, and shall say nothing about Swift and Dummmler and the other parties of whom we have heard so much; for, though the directors should be blamed for entering into those mining adventures, that would not support this charge unless it contributed to the insolvency which they desired to conceal and to deceive the shareholders. The first debt to which I shall call your attention is the sum advanced upon the Welsh works under various heads, amounting to an aggregate of 108,003*l.* 2*s.* 5*d.* Now, gentlemen, there was some security for these advances—viz., the mines; but these mines, at the highest estimate, could not have been worth more than half that sum, for in the month of June, 1854, when the directors put them up to auction, they fixed a reserve bidding at 60,000*l.* They were finally sold for 6000*l.*; but that ought not to be taken as the value of the security at the time. The next debt was the sum of 8600*l.* due by Harrison and other parties connected with the Islington Cattle Market Company. You recollect that every attempt was made to recover that amount, but the debt turned out to be utterly hopeless; as did De Tape's debt of 1193*l.* 18*s.* 4*d.* Then came the debt arising out of the advances made to Mullins, who is dead; and I wish that nothing but what is good could be said of the dead; but I am afraid that all parties concur in throwing just blame upon him. There is no doubt that advances were made to him, which, with the interest, amounted to 11,172*l.* 2*s.* 10*d.*; but he died insolvent, and that debt is totally lost. Then, we investigated the advances made to Humphrey Brown; but I do not think we are in a situation to know exactly the value of the securities which he gave to the bank for the advances which were made to him, amounting altogether to 74,437*l.* 3*s.* 1*d.* But though we do not know the exact value of the ships which he mortgaged to the bank, the value must be taken at the price which they would fetch at the time, and before the value of the shipping had fallen 40 per cent. as it did afterwards. It was said by the prosecution that the highest value was 48,000*l.*, and that a loss at least of 36,000*l.* was thus occasioned. But this is a question entirely for you. His Lordship here observed in favour of Brown, that he thought there was but little ground for saying that Brown had deceived the bank as to the value of his securities. Then there was the alleged loss on Oliver's debt, amounting to 14,162*l.* 4*s.* 5*d.*; but although he (Oliver) became insolvent, and paid scarcely anything in the pound (5*s.*), there were other names on his bills, and how much they had paid into the bank you are not fully informed. Then comes Macgregor, another director, who received advances to the extent of 7369*l.* 8*s.* 3*d.* He gave as security some policies, one of which realised 1181*l.* 18*s.*; and some shares in various companies which were worthless, so that upon his debt there was a loss of about 6000*l.* Next comes Blacker's debt of 4513*l.* 0*s.* 2*d.* He had forged the names of the acceptors to a number of bills which had been discounted by the bank, and therefore he was the only person liable upon them; but he fled the country, and the bills in point of law and value were utterly worthless. Then comes the debt of Gwynne, another director, amounting to 13,415*l.* 19*s.* 11*d.* He had deposited some shares in a company, but the debt is entirely lost. Then comes Cochran, another director, whose debt amounted to 9,503*l.* 3*s.* 5*d.* He is one of the defendants on this record, but he has fled the country, so his debt is entirely lost. Then there is the debt of Cameron, the general manager,

which amounted to 23,896*l.* 12*s.* 7*d.* ; but the value of his security is not yet well ascertained. There is evidence that he has property at Dingwall, which can be sold for forty years' purchase ; but it is impossible to tell how much it may produce. And yet, gentlemen, all these sums were taken into account, and credit is taken for them in the balance-sheet to December 31, 1855. In addition to this, it appeared from the books of the bank that there was a sum of 42,000*l.* owing upon past-due bills, upon which they had ceased to calculate interest, yet that sum of 42,000*l.* is included in the balance-sheet in the "assets" of the bank. You, gentlemen, will form your own opinion, but it seems to me that in this balance-sheet debts are included which were known to be bad to the extent of at least 100,000*l.* If so, I should think this balance-sheet is a false account. A balance-sheet should give some information to the shareholders as to the state of the bank ; but here credit is taken for 100,000*l.* worth of bad debts, just as if it had been 100,000*l.* invested in the Three per Cents. It is said it is the custom with banks to include bad debts in their balance-sheets as "assets." If so, it is a very strange custom, if there is no reserve fund for paying them. But it is said that there was a "reserve fund" for bad debts. If that had been so, and a proper sum had been reserved, the case would have been different ; but the fund reserved for the payment of bad debts, amounting, on the 31st of December, 1855, to 100,000*l.*, was only 339*l.* 1*s.* 7*d.* It seems to me, therefore, that there is strong evidence, but you are to consider it, and form your own opinion, that in this balance-sheet credit was taken for sums for which credit ought not to have been taken, and that this had a certain tendency to impose upon the shareholders. His Lordship here read over the evidence given by Mr. Barnard, the cashier of the bank from the commencement in 1849, respecting his examination of the past-due bills in April or May, 1855, under the direction of Cameron. According to his calculation the good bills were 52,584*l.* 4*s.* 5*d.*, the doubtful 52,976*l.* 15*s.* 8*d.*, and the bad 12,523*l.* 14*s.* 2*d.* ; total, 118,084*l.* 14*s.* 3*d.* Barnard, however, said that Cameron added to the number of bad bills, and made the amount 21,555*l.* His Lordship said he thought he ought also to read over the cross-examination of Mr. Barnard, as it was favourable to the directors. It stated in substance that he believed the securities held for the advances made by the bank were sufficient ; that the character of the bills of the bank became better as they went on ; that he believed that both Brown's debt and the securities on the Welsh mines would have been good if the bank had not stopped ; that he believed somebody would get a fortune out of the works yet, as they only wanted capital ; that he himself believed the bank to be solvent till within a short time of the stoppage, and had in consequence advised his friends to take shares, and also refused a more lucrative situation than the one he held in the bank ; that the business of the bank had greatly improved during the last year, and that more than 1000 new accounts had been opened in the year ending June 30th, 1855, &c. His Lordship then proceeded to read Crawford's evidence as to the manner in which the balance-sheet was made out by him. The general principle was to state the result of the different books, and, giving credit to them that what they stated was true, the balance-sheet would be a true account of the state of the affairs of the bank ; but if those books were wrong the balance-sheet would be a delusion and snare. There could be no doubt that Crawford did his duty in taking out the accounts correctly, and if

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the materials had been solid the result would have been unexceptionable. He (Crawford) prepared three tabular statements of accounts, marked A., B., and C., and gave them to Cameron. The balance-sheet for December 31st, 1855, was then made from the balance-sheet of June 30th, 1855, by merely altering the figures. This was done by Crawford under Cameron's directions. His Lordship observed that, though Cameron was not a director, and had no vote at the Board, he was answerable for the manner in which the balance-sheet was made out under his superintendence and by his directions. The jury would say whether it it was true or false. The balance-sheet having been first approved by the directors, at a court held in the latter part of January, was laid before the proprietors at a general meeting held on the 1st of February, 1856. It gave a very flattering account of the state of affairs, and it was for the jury to say, looking at the evidence, whether that balance-sheet was true, and justified the directors in their report in which they declared a dividend of 6 per cent. The balance-sheet showed that there was a "gross balance for the year ended the 31st of December, 1855, after making a provision on account of bad debts, and paying interest (25,320*l.* 8*s.* 3*d.*) on deposits and promissory notes, and balances," amounting to 30,551*l.* 2*s.* 7*d.* On the other side they took credit, under the head of "assets," "by loans on convertible securities for short periods, advances on cash credits, bills discounted," &c., for 986,272*l.* 11*s.* 1*d.* But in that sum of 986,272*l.* 11*s.* 1*d.*, there was included the 108,000*l.* advanced on the Welsh Works, the debts of the Islington Cattle-market Company, Mullins, Brown, Macgregor, Oliver, Blacker, Gwynne, Cochran, and Cameron. Now, on the 1st of February, upon the occasion when the report and balance-sheet were laid before the general meeting, all the defendants were present. Then they came to a resolution that the report should be adopted, and that there should be a dividend of 6 per cent. for the half-year. It would be for the jury to say whether the shareholders were not grossly deceived, and whether there was not on the part of the defendants an intention to deceive. There was evidence given of other overt acts, such as the issue of circulars, which would only be wrong in case the defendants knew the bank to be insolvent at the time; but there was also evidence of purchasing the bank shares with the bank's money, which would not be justifiable under any circumstances. After the general meeting the bank went on till the beginning of September, 1856, when the bank stopped. It was then found that there was a deficit of 220,562*l.* 17*s.* 10*d.*, which must fall either upon the shareholders or on the depositors. The jury would now say whether the defendants had this guilty design to deceive the shareholders. If the defendants knew of the insolvency of the bank they ought to be found guilty; but if any of them did not know of its insolvent state the jury ought to acquit them. His Lordship then proceeded at great length to comment upon the evidence, as it affected the several defendants. And first, with respect to Cochran, his Lordship said he had gone abroad, and therefore the jury might dismiss him from their consideration. His Lordship said he would consider the cases of the defendants in a different order from that adopted by the learned counsel (Mr. Atherton), but without saying the principle on which he arranged them. He would take them in this order—Stapleton, Owen, Macleod, Kennedy, Esdaile, Brown, and Cameron. With respect to Stapleton, his Lordship thought no blame could attach to the prosecution for including him with the other defendants, because it was most

proper that the conduct of the whole of them should be examined ; nor could he impute any blame to the prosecution for taking the opinion of the jury upon Mr. Stapleton's case ; " although," said his Lordship, " I must confess that I rather expected after the evidence had been closed that there might have been an intimation that, so far as Mr. Stapleton was concerned, no sufficient case to be presented to the jury had been established." But it was not for him to interpose, and as there was evidence to go to the jury, they must decide whether Stapleton was guilty or not. His Lordship then reminded the jury that Stapleton did not join the bank till the 31st of July, 1855, and that he took no active part in it till his return from Scotland on the 16th of October. His Lordship reminded the jury that Stapleton did not join the bank with a view to profit, but because being a barrister, and not meeting with great success, for " the race is not always to the swift, nor the battle to the strong," he wished to be employed. He was recommended to the bank as a flourishing and respectable establishment ; and it was admitted by Sir F. Thesiger (now Lord Chancellor) that when he entered it he was in utter ignorance of the state of its affairs. He held twenty shares, which he had not tried to dispose of, and the only benefit he derived from the bank was the dividend upon his shares. It was he (Stapleton) who moved for the appointment of a committee on the convertible securities ; and though he had thus become acquainted with Brown's debt it was not to be inferred that he really knew the bank to be insolvent. The jury would form their own opinion, but he (Lord Campbell) saw nothing down to the 1st of February, 1856, to show that Stapleton was aware of the insolvency of the bank. It appeared also that so late as August, 1856, only a few days before the bank stopped payment, he wrote a letter to his friend Mr. Alexander Matheson, in which he stated that, although there was a run upon the bank, he believed that if some gentlemen of known wealth would join them the public confidence would be restored, and he asked Mr. Matheson whether, if he should be satisfied that the bank was solvent, he would join the board. His Lordship here read over the evidence given by Mr. Paddison and the other witnesses, who stated that they had never seen anything in the conduct of Stapleton that was inconsistent with the highest honour and integrity, and added, that if the jury took the same view of Stapleton's case that he did, he (Stapleton) would leave the court without a stain upon his character, and if he should at any time return to his profession of a barrister, his Lordship said he should be glad to see him practising in any court over which he presided. The next name was Macleod, and, although there was more evidence against him, there was no positive proof. He was not a speculator, nor had he obtained advances from the bank. He purchased a large number of shares and invested in them the sum of 5,000*l.*, and, instead of speculating with them, he made them the subject of his marriage settlement. He certainly was a director from 1853 down to the stoppage ; and if he had gone through the same laborious investigation of the books which had occupied the court so many days, he might have acquired a knowledge of the insolvency of the bank. His Lordship here referred to the excellent character which Macleod had received from the witnesses, particularly from Mr. Bullen, the eminent special pleader, whose pupil Macleod had been. His Lordship thought a more serious case was made against Owen, who had been much longer a director ; but he had invested all his savings in the bank and had not derived any benefit from it. An excellent character had also been given to Owen, and his

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Lordship left it to the jury to say whether, under these circumstances, they ought to find him guilty. His Lordship then referred to the evidence as it affected Kennedy with great minuteness, and particularly referred to the letter addressed to him by Cameron on the 15th of May, 1855, as showing that even at that time he must have had a strong suspicion as to the insolvency of the bank. The letter ran thus :—

I cannot but consider the retirement of Mr. Spens as something serious, and requiring a serious course on our part. It occurs at a most unfortunate time, and interrupts the progress I hoped I was making towards strengthening the board. No one is more deeply interested than yourself (Cameron), and I wish to press this, your personal interest, upon you very emphatically, and to beg you not to allow yourself to be misled by false hope, or deceived by your own wishes, and to give me your professional assistance, taking Crawford and Duncan into council, and, as a result, weighing the "pro" and "con" very carefully, to report on the following terms :—

1. How far are we really compromised by the various untoward occurrences which have befallen the bank, the iron works, Gwynne, M'Gregor, Mullins, Oliver, &c.

2. The real *bond fide* commercial or legal deficit by bad debts and losses generally, and our personal liability to our shareholders, through your last report, as contrasted with the necessity we lay under to communicate such a deficit to them when it attained to twenty-five per cent. of the capital.

3. What are your prospects of business to relieve past disasters ?

Do they justify going on, even supposing the charter would warrant our doing so, for, as respects an appeal to our shareholders, to state losses, and obtain their acquiescence to relinquish dividend, and whip up to restore lost capital, I should pronounce it at once as simply puerile, and the most certain and ignoble course of official suicide.

If four good men were to join the board, and the public would subscribe 2,000 more shares, I should have no fear for the future; but this does not appear likely.

Could the jury doubt that when Kennedy wrote that letter he must have entertained the belief that if the true state of affairs were known it would lead to the stoppage of the bank? And yet after writing that letter in May, 1855, he concurred in the report and balance-sheet presented to the shareholders on the 1st of February, 1856. His Lordship also referred to the speech made by Mr. Kennedy at the meeting; and to the discussion which had taken place in the court of directors, in 1855, on the subject of the 71st clause of the charter, which required the directors in case at any time the losses should exceed one-fourth of the paid-up capital and surplus fund, to convene a meeting of proprietors to dissolve the company. On the other hand, there was the fact that he had derived no personal benefit from the bank, and had induced his family to become shareholders and customers. His Lordship then came to the case of Esdaile, the governor of the bank, and observed that he (Esdaile) had derived no benefit from the bank, and had not obtained any money from it; but he was concerned to state that out of his own mouth, he had a knowledge of the true state of its affairs. His Lordship here read a large portion of the deposition made by Esdaile in a proceeding which had been instituted in Chancery under the Winding-up Act, in which that defendant had stated in the most explicit manner his knowledge of the various debts of the bank, and which left no doubt that he must have known that it was in an insolvent state. His Lordship also read the letter which Esdaile had written to

the deputy-governor, Owen, on the 15th of January, 1856, in these terms :—

If you or the general manager cannot satisfy me by personal assurances from each of my co-directors that they will support me with their presence and countenance on our forthcoming annual meeting, I shall abstain from entering the court-room again; and, in that case, you will, if you please, officially place the accompanying notice of my resignation in the hands of the general manager.

Our highest policy is to present a solid front to the public; our weakest conduct is to dangle a rope of sand before them.

Believe me, &c.,

EDWARD ESDAILE.

The postscript ran thus :—

We want courage and coolness, and, with God's blessing, our difficulties will be surmounted.

His Lordship then proceeded with the evidence as it affected Brown; and called upon the jury to dismiss from their minds all prejudice, and to consider him as an innocent man until his guilt was proved. He had borrowed largely from the bank, and, having given securities, he had a strong interest in keeping up the bank as long as possible; but he was afraid that destruction would come down upon it and him, if strong measures were not taken. His Lordship here read a long letter which Brown had written on the subject of his debt to the bank, in which he complained of the course the directors were taking to realize his securities, particularly referring to the advances made on the Welsh works and other bad debts which the bank had made. His Lordship also referred to the statement made by Brown in the court of directors in the year 1855, when he said that one-fourth of the paid-up capital and reserve fund being lost, it was their duty to convene a meeting under the 71st clause of the charter to dissolve the company, and that if they went on any longer they would do so on their own personal responsibility. His Lordship then came to the case of Cameron, who, he said, had borne a high character, but it appeared he was a sanguine man, and hoped that the bank would become a valuable establishment. It would be for the jury to say whether, being disappointed in that hope, he had not resorted to unworthy means, and become a party in a scheme for deceiving the shareholders. The bank commenced with a small capital, less than 50,000*l.*, and it soon got into difficulties. The jury would say whether it was not contrived that there should be a series of balance-sheets to deceive the public, to conceal the loss which had been sustained, to make it appear a flourishing concern, and to draw in purchasers of new shares. The balance sheet and report were prepared under the direction of Cameron, and the jury would say whether the directors and Cameron were not acquainted with the real state of the bank's affairs. It would be for them to say whether any two or more of the defendants were guilty; and though it would be a great satisfaction to him if they could say they were not guilty, he (Lord Campbell) was sure they would not shrink from their duty, but would give a verdict which would be satisfactory to their consciences and to the country. His Lordship concluded by advising the jury to retire.

The jury then retired to consider their verdict.

The foreman said the jury were unanimous to find three of the

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defendants guilty, eleven of the jury had agreed to find them all guilty, but he (the foreman) dissented from the latter verdict.

Lord CAMPBELL, C. J., said the verdict of the jury must be unanimous. The jury must retire and reconsider their verdict. His Lordship then observed that he did not know whether a *nolle prosequi* could be entered as to the other four defendants?

Kennedy (for Brown) opposed that, and said it could not be.

Atherton, Q. C., said that in the discharge of his duty he could not consent to that.

Lord CAMPBELL, C. J., said he did not know that that course could be adopted, and directed the jury to withdraw and reconsider their verdict.

In answer to a question from a jurymen,

Lord CAMPBELL, C. J., said, that before convicting any one of the defendants, the jury must be persuaded that he was acquainted with the insolvency of the bank, and knew that the balance-sheet was not a true representation of the state of its affairs.

The jury then again retired, and after some time they sent for Kennedy's letter to Cameron of the 15th May, 1855. The letter was sent to them by Lord Campbell's directions; and at a few minutes past eight they returned into court.

The foreman then said that they found all the defendants *Guilty*; but strongly recommended four of them, viz., Stapelton, Kennedy, Owen, and Macleod, to the mercy of the court.

Lord CAMPBELL, C. J.—Mr. Atherton, do you pray judgment? I am prepared to deliver judgment.

Atherton, Q. C.—As your Lordship is prepared, I pray judgment.

Lord CAMPBELL, C. J.—I shall first pass sentence upon you, Humphrey Brown, Edward Esdaile, and Hugh Innes Cameron. After a long and, I hope, impartial trial, you have been convicted by a jury of your country, upon the clearest evidence of an infamous crime. You were charged with conspiring to deceive and defraud the shareholders of the bank to which you belonged by false representations, and it is clear that you did so. I acquit you of having originated this bank with the fraudulent intent to cheat the public; but it is now demonstrated that for years you have carried on a system of deliberate fraud, and fabricated documents, for the purpose of deceiving the public, for your own direct, or indirect, benefit. It would be a disgrace to the law of any country if this were not a crime to be punished. It is not a mere breach of contract with the shareholders or customers of the bank; but it is a criminal conspiracy to do what inevitably leads to great public mischief in the ruin of families, and reducing the widow and orphan from affluence to destitution. I regret to say that in mitigation of your offence it was said that it was a common practice. Unfortunately, a laxity has been introduced into certain commercial dealings, not from any defect in the law, but from the law not being put in force; and practices have been adopted, without bringing a consciousness of shame, and I fear without much loss of character among those with whom they associate. It was time a stop should be put to such a system, and this information was properly filed by Her Majesty's Attorney-General, and the jury have properly

found you guilty. I hope it will now be known that such practices are illegal, and will not only give rise to punishment, but that no length of investigation, no intricacies of accounts, and no devices will be able to shield such practices. On account of this being the first prosecution of this nature, I pronounce a milder sentence than I otherwise should ; but the mildest sentence that I can pronounce upon you, Humphrey Brown, Edward Esdaile, and Hugh Innes Cameron, is that you be imprisoned in the Queen's Prison for one year.

Richard Hartley Kennedy, the jury have recommended you to mercy, and I think there are grounds which justified them in coming to that conclusion ; but still there is strong evidence against you. That paper for which the jury sent shows that, though you were a respectable member of society, and filled creditably the office of sheriff, you lent yourself to this deception. You did not derive any personal advantage from it, but it is clear to my mind that when you joined in that last report you were fully aware that the bank was insolvent, and you knew it to be false. The lightest sentence I can give you is nine months imprisonment in the Queen's Prison.

William Daniel Owen, the jury have found that you also had a guilty knowledge of the insolvency of the bank when you concurred in that report and balance-sheet, and I cannot say they were wrong, for you had long been a director, and had ample means of information, and several papers read show that. Therefore, though I think you are less guilty, you must be imprisoned for six months.

Henry Dunning Macleod, the jury, who are the proper judges of the fact, have found you also guilty. The sentence upon you is that you be imprisoned for three months.

John Stapleton, the jury have found you guilty ; but I cannot conscientiously order you to do more than pay a fine of 1s. to Her Majesty, and be discharged.

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of a joint
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COURT OF CRIMINAL APPEAL.

January 23 and February 1, 1858.

(Before all the Judges, except BRAMWELL, B.)

REG. v. AARON MELLOR. (a)

*Mistrial—One jurymen answering and being sworn in the name of another—Error—Jurisdiction of this Court—Discovery of mistake after conclusion of trial.**Upon a trial for murder, one jurymen answered and was sworn and served in the name of another jurymen. The prisoner was convicted and sentenced. On the following day the mistake was discovered; and a case was reserved for the opinion of this court.**Two questions were raised: first, whether there had been a mistrial; second, whether this court had jurisdiction to decide that point.**Held, by Lord CAMPBELL, C.J., COCKBURN, C.J., COLERIDGE and WIGHTMAN, JJ., MARTIN and WATSON, BB., that there had been a mistrial, and that this court had jurisdiction to order that the prisoner should be tried again.**By ERLE, CROMPTON, CROWDER, WILLES, and BYLES, JJ., and CHANNELL, B., that there had been no mistrial; and by POLLOCK, C.B. and WILLIAMS, J., that if there had been a mistrial, this court had no jurisdiction to set aside the verdict and order a second trial.**Held, also, by ERLE and CROMPTON, JJ., and CHANNELL, B., that this court had no jurisdiction; and CROWDER, WILLES and BYLES, JJ., were also inclined to the same opinion.*

THE following case was reserved by WIGHTMAN, J.:

At the last winter gaol delivery at Liverpool, Aaron Mellor was convicted of murder, and sentenced to death, but execution has been respited until the opinion of the Court of Criminal Appeal is taken as to the effect of a mistake which occurred upon the trial, but which was not discovered until the day after.

The panel of petit jurors returned by the sheriff, contained the names of two persons, Joseph Henry Thorne and William Thornley. The name of Joseph Henry Thorne was called from the panel as one of the jury to try the case of Aaron Mellor, and Joseph Henry Thorne, as was supposed, went into the box and was duly sworn as Joseph Henry Thorne, without challenge or objection.

(a) Reported by A. BITTLESTON, Esq, Barrister-at-Law.

It was, however, discovered the next day, and after the prisoner had been convicted, that William Thornley had by mistake answered to the name of Joseph Henry Thorne when called, and had gone into the box and been sworn as Joseph Henry Thorne, the prisoner having been offered his challenge when the person called Joseph Henry Thorne, but who was really William Thornley, came to the box to be sworn.

The mistake appeared to me important, as the prisoner might have had very substantial ground of challenge of William Thornley though none of Joseph Henry Thorne, whose persons he might not know; and such mistake, whether wilful or accidental, would virtually render the right of challenge nugatory.

A case is reported in a note to the case of *Hill v. Yates* (12 East, 231), and is called the Case of a Juryman, in which it is said to have been held, in 1783, by all the judges that such a mistake as that in question is not objectionable, as a mistrial or in arrest of judgment, or upon writ of error, but is ground of challenge only. As, however, the objection is that by the mistake the prisoner's right of challenge may be rendered nugatory, I did not feel perfectly satisfied with that decision, and have reserved the point for the consideration of the court, and have respited the execution of the sentence upon the prisoner until the court has given judgment.

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Fernley, for the prisoner.—The only criminal cases in which a similar question has arisen, are the Case of a Juryman cited in *Hill v. Yates* (12 East, 229), and *R. v. Tremearne* (5 B. & C. 254); and they afford no authority for supporting the conviction in this case. The very form in which the challenge of the jury is offered to the prisoner, shows that the personal appearance of the man called is essential to the valid constitution of the tribunal. (He referred to Archb. Crim. Pl. & Evi. 137; 2 Hale's P. C. 271; 13 Sta. Tri. 311.) In the early cases a mere misnomer of a jurymen was considered enough to constitute a mistrial (*Moor v. Vaughan*, Cro. Eliz. 430; *Hasset v. Payne*, Cro. Eliz. 256); but in *Wray v. Thorn* (Willes, 488), the distinction is drawn between a case of misnomer merely and a case of personation; and in *Norman v. Beaumont* (Willes, 484; Barnes, 453), where a person not summoned answered and served as a jurymen in the name of one who was on the panel, the verdict was set aside on the ground of mistrial. (He also cited *Russell v. Ball*, Barnes, 455; *Parker v. Thornton*, 2 Stra. 1410.) *Hill v. Yates* (12 East, 229), is at variance with *Norman v. Beaumont*; but it rests upon the supposed authority of the Case of a Juryman mentioned in the note at p. 231; and that case does not support the decision, being a case of misnomer only, and not a case of personation. Nor has it met with complete approbation since: (*Dovey v. Hobson*, 6 Taunt. 460; *R. v. Tremearne*, 5 B. & C. 254; *R. v. Metcalfe*, 3 Cox Crim. Cas. 220.) The substantial objection in this case is, that, practically, the prisoner is deprived of the opportunity of challenging one of the

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persons who tried him. He cannot be supposed to know the persons of all the jurymen on the panel; and his mind was never directed to the person who tried him, and whom he may have known by name to be hostile to him.

Sowler, for the prosecution.—The old forms of proceeding with respect to the challenge of jurors import that the material thing was, that the accused should have full opportunity of seeing each jurymen as he came up to the book to be sworn, a large Bible being usually placed in the centre of the court for that purpose: (Talfourd's *Dickenson*, 499; *Tomlin's Dict. "Jury."*) No doubt it is important that the jurymen should be called and sworn by their right names; but it is admitted that a mere misnomer of a juror is no sufficient ground for setting aside a verdict; and *Hill v. Yates*, applies the same rule to a case of personation. Indeed, the very same grievance to the prisoner might as probably arise in one case as the other. [Lord CAMPBELL, C. J.—There is a further question, whether this is a case within the jurisdiction of this court.] It is certainly very doubtful whether this was a question of law arising at the trial.

Fernley, in reply.—As much so as a question raised by motion in arrest of judgment; and questions so raised are entertained by this court. As to the mistrial, he referred to *Muirhead v. Evans*: (6 Exch. 447.)

Cur. adv. vult.

JUDGMENT.

Monday, February 1.

In consequence of a difference of opinion amongst the Judges, each of their Lordships delivered a separate judgment.

Lord Campbell,
C. J.

Lord CAMPBELL, C. J.—In this case I am of opinion that under the stat. 11 & 12 Vict. c. 78, we have jurisdiction to consider and decide the question submitted to us by the judge who presided at the trial. Although the question was not discussed, the facts upon which it arises had occurred during the trial, and the judge, while still acting under the commission, respited the execution of the sentence, and reserved the question for the opinion of this court. It therefore seems to me to be "a question of law which arose at the trial." The salutary operation of the statute would be greatly impaired if it were confined to questions of law which had been openly discussed during the trial. Since the statute passed, judges have usefully reserved under it questions as to the admissibility of evidence which had not been discussed during the trial; and if the question might have been discussed before the sentence was pronounced I think that the judge, acting under the commission, has authority to reserve it and to respite the execution of the sentence. I would further observe that the question reserved is one purely of law—wholly irrespective of the merits—being, not whether the verdict was right, but whether, in point of law, the tribunal before which the trial took place was duly constituted. After deep and anxious deliberation I feel bound to say that in my opinion there has been a mistrial, and that there ought to be a *venire de novo*. By the law of England, on a trial for felony, there is allowed to the prisoner not only a challenge for cause to any juror who may be called upon his trial on the ground of disquali-

fication or partiality, to be established by evidence, but, says Blackstone, "an arbitrary and capricious species of challenge to a certain number of jurors without showing any cause at all, which is called a peremptory challenge; a provision full of that tenderness and humanity to prisoners for which our English laws are justly famous." The importance attached to this privilege is illustrated by the solemn warning which, according to established procedure, the clerk of assize gives to the prisoners when the jury is to be impanelled. By the rules of law respecting the officer by whom the jury shall be returned and the qualification of jurors, the utmost anxiety is shown that juries should be properly constituted, and it has been by a strict attention to the spirit of these regulations that trial by jury in England has continued to be held in reverence by the people. But this prisoner, Aaron Mellor, has been tried and found guilty by a juror, William Thornley, to whom he had no just opportunity of offering a challenge, either peremptory or for cause. The clerk of assize said to the prisoner:—"These good men who have been called are to pass between our Sovereign Lady the Queen and you on your trial; therefore, if you would challenge them or any of them, you must challenge them as they come to the book to be sworn, and before they are sworn, and you will be heard." William Thornley had not been called, and never was called on this trial; yet he was sworn, and he served upon the jury, he having come to the book to be sworn when the name of Joseph Henry Thorne was called. The prisoner had good reason to suppose that it was truly Joseph Henry Thorne who then appeared. Although the prisoner is desired to look upon the jurors, the law cannot presume so unreasonably (and which in a great majority of cases would be contrary to the fact) as that the prisoner shall know the face of every jurymen returned upon the panel. But without knowing the face either of Joseph Henry Thorne or of William Thornley, this prisoner might have had reason to believe that Joseph Henry Thorne was impartial and that William Thornley had a spite against him. When William Thornley appeared, the name of Joseph Henry Thorne had been called and William Thornley was allowed to be sworn and to serve. But if his true name of William Thornley had been called the prisoner might have challenged him either peremptorily or for cause. There having been no proper opportunity to challenge William Thornley, he had no right to serve as a juror on the trial of this prisoner, more than any stranger who might have got into the jury-box after the jury was sworn. In the jury-box there never were more than eleven jurymen whom the law could recognize. The objection is in no degree weakened by the fact that William Thornley's name was upon the panel, as he was not called on the trial of Aaron Mellor. But it is most material to bear in mind that this is not a case of mere misnomer, where there being some mistake upon the panel in the name of a jurymen regularly summoned and sworn, it may still be truly said, "*constat de personâ*." Joseph Henry Thorne, whose name was called and who did not appear, was an existing person and a different person from William Thornley, who did appear, who was sworn, and who served. Upon principle, therefore, there seems to me to have been a mistrial, as much as if all the twelve jurors who served had been different persons and had different names from the jurors called by the clerk of assize, in which case the prisoner would have been entirely deprived of his right of challenge. I presume that to constitute a valid trial it is quite as essential that the jury

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should be clothed with legal authority as the judge. But if it should be discovered in a capital case (after sentence of death had been passed) that by some mistake the name of the judge who presided had not been inserted in the commission, would not this be a mistrial, without any proof that the prisoner had been prejudiced by the mistake? To guard against such a mistake the commission is always read in open court at the commencement of the assizes; and I have heard of a judge who was so scrupulous that he would always verify the fact by ocular inspection that his name was in the commission, from an apprehension of the terrible responsibility he would incur if his name should have been omitted. When the authorities on this question are examined they appear to me strongly to support the position that in this case there has been a mistrial. They make the distinction between the mere misnomer of a jurymen regularly summoned, and the case of there being in existence two different persons, and one of them appearing and serving instead of the other, who ought to have appeared and served. With the exception of *Hill v. Yates* (12 East, 229), I am not aware of any decision even in a civil case, that if a person improperly answers, and is sworn and serves as a jurymen, instead of another, this is not a mistrial. It was held in *Fermor v. Dorrington* (Cro. Eliz. 222), and in *Hasset v. Payne* (Cro. Eliz. 256), that where one person was named in the panel and another in the *distringas*, and the latter served on the jury, it was a mistrial. And the authority of these cases is fully recognized by Bayley, J., in *Rex v. Tremearne*: (5 Barn. & Cr. 257.) To remedy the strictness that had once prevailed, which was extended even to misnomer, stat. 21 Jac. 1, c. 13, was passed, by which it was enacted "that no judgment shall be stayed or arrested after a verdict because any of the jury who tried the issue is misnamed, either in the surname or addition, in any jury process, or in any return thereupon, so as upon examination it appear to be the same person who was meant to be returned," identity of person being carefully made a condition. After the statute occurred the case of *Roe and Bond v. Devys* (Cro. Car. 563; Sir W. Jones, 448; Danvers, 330), of which we have this accurate abstract from Willes, C.J., (Willes, 493):—"In the return to the *venire* a jurymen was named Samuel, and so in the *distringas*, but in the panel annexed he was called Daniel, and sworn by that name, as appears by the record, and gave a verdict for the plaintiff; though this was not within 21 Jac. 1, yet it appearing upon the examination of the juror himself that he was the person returned, and that his right name was Samuel, and that there was no other person of that name in the parish, and by the examination of the sheriff and his clerk that it was the misprision of the clerk, who, though he had the *distringas* before him, wrote Daniel for Samuel in the panel, and the juror likewise swearing that there being a great noise in the court when he was sworn he answered, supposing himself to be called by his right name of Samuel, the record was ordered to be amended and the judgment was not stayed." So cautious was the court to ascertain that there were not two persons, one of whom had appeared and served instead of the other. But the leading case upon this subject is *Norman v. Beaumont* (Willes, 484; Barnes, 453), in which Chief Justice Willes, and his brother judges, after great deliberation, set aside a verdict for mistrial, because one of the jurymen was not returned on the *nisi prius* panel, but answered to the name of a person who had been summoned. On the trial Richard Shepherd, not summoned, answered as a jurymen

when Richard Geater, who was upon the panel, was called. *Per* Willes, C. J. :—"A challenge to a jurymen supposes him capable of serving on the jury if the objection be answered; but Richard Shepherd was no jurymen at all." And to the objection that it did not appear on the record, he said that in such cases where the objection could not appear on the record the fact might be ascertained by extraneous evidence. The authority of this decision is strengthened, instead of being shaken, by the next case of *Wray v. Thorn* (Willes, 488), where the court refused to set aside a verdict and grant a new trial because one of the jurors was named Henry in the *venire, habeas corpora*, and *postea*, his real Christian name being Harry. In a most elaborate judgment Willes, C.J., gives this as the *ratio decidendi* :—"It appears by the affidavit which makes out the objection that the jurymen who was sworn on the jury and tried the cause was the person who was summoned and returned and intended to be a juror in the cause, which is the very reason relied on in the statute 21 Jac. 1, c. 13." I now come to the case of *Hill v. Yates*, (12 East, 229), where a futher being summoned and returned upon the panel, his son, who was not summoned or returned, answered to his father's name when the panel was called, and, having served as one of the jury on the trial, it was held that this was not a sufficient ground for setting aside the verdict as for a mistrial. Supposing this case to have been well decided, it would by no means be an authority to support this conviction, there being a manifest and important difference between the trial of a civil action and a criminal trial, in which there is a right of peremptory challenge. But I must use the freedom to say that the manner in which the decision was pronounced considerably detracts from its authority. Although there was the solemn decision of a court of co-ordinate jurisdiction expressly in point to support the application, a rule to show cause was refused, and the question never was deliberately argued. "The court recollecting (it is said in the report) that the same objection had been taken and overruled since the case in Willes, though the name of the case did not then occur, refused to entertain the motion." The supposed overruling case turned out to be "The Case of a Jurymen," to be found in the MS. book of Crown cases (b) determined formerly in conference by the judges, now in my custody as Chief Justice of the Queen's Bench, and it is accurately printed in a note, 12 East, 230. But that case, when examined, instead of overturning *Norman v. Beaumont*, will be found perfectly reconcileable with it, being founded on the distinction between misnomer and one person serving as a jurymen instead of another. Robert Curry, the juror who served, had been summoned and was returned by the sheriff under the name of Joseph Curry, and there was no Joseph Curry summoned or returned on the panel, or who could have been mistaken by the prisoner for Robert Curry. Mr. Baron Eyre, who had presided on the trial, therefore justly thought and said that "it amounted to nothing more than a mere misnomer in the panel of the jurymen intended to be returned, and who did serve." Accordingly, upon a conference of the judges, they were "unanimously of opinion that this was no ground of objection, even if a writ of error were brought—much less on a summary application." Thus, it is quite clear that the Jurymen's Case, proceeding on the ground of misnomer of the right person who was called, does not apply to the

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(b) His Lordship observed that he had in his custody six volumes of those cases, and that it would be found very convenient if he were at liberty to hand them over to the library of one of the Inns of Court.

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substitution of a wrong person for the right person, and cannot be considered an authority to support the present conviction. Lord Ellenborough certainly does use very general and strong language, "in order (as he says) to put at rest the question once for all, that applications of this sort might not be made again and again." But the law of the land cannot be altered in this summary manner, and if the existing exercise of the right of challenge really leads to inconvenience, it can only be curtailed by the Legislature. The cases which have occurred upon this subject since *Hill v. Yates*, although not conclusive, have, I think, a tendency to support the principle on which I think that our judgment ought to be for the prisoner. In *Dovey v. Hobson* (6 Taunt. 460), a person not summoned on the jury having been sworn on a jury in the name of a person for whom a summons to serve on that jury was delivered and to whose house he had succeeded, the court held it a mistrial, and awarded a *venire de novo*. There the objection was started before the verdict was delivered, but after the case had been gone through without any objection being taken by the counsel on either side; and Gibbs, C.J., said:—"We think that the eleven jurymen being well summoned and a twelfth not being well summoned, and a verdict taken by the twelve and the objection being pointed out at the time, the court, in the exercise of their discretion to grant a new trial or not, ought to set aside this verdict and to grant a *venire de novo*." If this had been merely a case of misnomer, instead of personation, a different course would no doubt have been adopted. *Rex v. Tremearne* (5 Barn. & Cr. 254), was likewise a case of personation, and the same course was followed as in *Dovey v. Hobson*, although the mistake was not discovered till after verdict. On the trial of an indictment for perjury it was necessary to swear *talesmen* from the common jury panel, and one J. Williams being called, his son, R. H. Williams (at the request of his father, and without collusion with the prosecutor or defendant), appeared for him, and was sworn and served on the jury. Held that there was a mistrial, and a *venire de novo* was granted. The son was under age, and was not qualified to serve on the jury, and no doubt considerable weight was given to these circumstances; but the circumstance of a man, on trial for his life, being deprived of his right of challenge is surely as strong; and there Lord Tenterden points out emphatically that the court would not be justified in allowing a verdict which they disapprove of to stand, from the apprehension of mischief which may hereafter arise. The most recent case referred to is *Reg. v. Metcalfe* (3 Cox's Crim. Cas. 220), where on a trial for felony there had been the personation of a jurymen, discovered after verdict. Maule, J., would not pronounce judgment on the prisoner although the verdict was upon clear evidence; but, without expressing any positive opinion whether there had been a mistrial, he directed the prisoner to be tried on another indictment for another larceny, on which he was regularly convicted and sentenced. The weight of authority, therefore, seems to me considerably to preponderate in favour of the prisoner, and upon the whole I am of opinion that the conviction is wrong, and that the sentence cannot legally be carried into execution. It has been suggested that we ought to require the prisoner to bring a writ of error, which might be carried by the Crown before the House of Lords. But, if we have jurisdiction to consider the question, surely we ought finally to decide it, which we can do in this court without being perplexed by the technicalities by which a writ of error would be surrounded. The fullest powers are conferred upon us by the statute

for this purpose, and the simple and expedient course seems to be at once to set aside the verdict and judgment, and to order that the prisoner may be tried before another jury properly constituted. The prisoner cannot complain of this proceeding, nor can the Crown. We have heard counsel representing the Crown in support of the conviction, and the Crown can have no wish except that justice may be satisfactorily administered. There may certainly be a dread that frivolous objections to procedure in criminal cases may be encouraged by our decision ; but it is no frivolous objection that the prisoner on a trial for murder was, without any fault of his own, deprived of his right to challenge one of the jurymen who tried him, and I hope the judges may safely rely upon their own efforts, and, if necessary, upon the aid of the Legislature, to repress mere technicalities, which seek to screen guilt instead of protecting innocence. What "justice requires," in my opinion, is that we order an entry to be made on the record, setting forth the case reserved by the judge, and the proceedings thereupon in this court, and that in our judgment the party convicted ought not to have been convicted, and that a *venire de novo* issue, so that he may be tried for the offence for which he stands indicted at the next gaol delivery for the county of Lancaster, and that he be detained in custody to take his trial accordingly.

COCKBURN, C. J.—The questions that arise in this case appear to me to be involved in very grave and serious doubt. I doubt, in the first place, whether we have jurisdiction under the statute to enter on such a matter as this ; and, in the second place, whether, if we have, the facts, which are stated for our consideration, show that there has been a mistrial in the present case. But upon the whole I am led to concur in the resolution to which my Lord Chief Justice has arrived. I am disposed to think that if in the course of the trial the fact, which afterwards came to the knowledge of the learned judge, had come to his knowledge then, namely, that one of the jury had answered to a wrong name, and had been sworn by mistake, it being supposed that he was another man, it would have been a case in which it would have been the duty of the judge to discharge the jury, and to have another impanelled ; and that, consequently, by a liberal construction of the statute which gives us jurisdiction, (and I think, that looking at the purpose for which it was passed, we ought to give it a liberal and enlarged construction), this question may be considered as within our cognizance. As regards the second question, namely, whether there has been a mistrial, I own that it is not without considerable hesitation and reluctance that I come to the conclusion in the affirmative ; because, in this case, it seems to be admitted that no practical injustice of any sort or kind has been done to the prisoner ; he has sustained no wrong, and so far as we are made aware, he has preferred no complaint, nor is it alleged on his behalf that he has been in any way prejudiced or wronged by what took place at the trial. Nevertheless, there can be no doubt that a prisoner might sustain a very serious prejudice by such a mistake as the present, under a state of circumstances by no means inconsistent with probability, and which may very readily be suggested ; for it might well be that a man might know that there was on the panel, and summoned to serve at the assizes, one man who was his foe, and another man who was his friend,—that having made inquiries with respect to them, he might have ascertained that one man entertained the strongest opinion of his guilt, while the other entertained a favourable opinion of his innocence, and that he might therefore have the strongest reason for challenging the one man and not the other, so that he might by such a mistake as this be, as I

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have said, most seriously affected in the result, by there being on the jury who tried him, a man to whom he would voluntarily have objected, had he known that he would be called, while on the other hand, he believed he was being tried by a man he believed to be favourable to him. Now, that which presses strongly on my mind and which leads me, though not without great doubt and hesitation, to a conclusion is this, that for such a case I see no remedy. It may be said indeed, in such a case, that application may be made to the Crown if it could be shown that the prisoner had sustained on a trial such a prejudice as that, with the view that by making that application to the Crown a pardon might be obtained. There again very serious inconveniences appear to arise: in the first place, a guilty man might, under those circumstances, entirely escape with perfect impunity, and, on the other hand, an innocent man would be placed at the mercy of the Crown, or of those who happened at the period of the application to be its advisers; and I believe that so far as the constitution of the jury is concerned, who are to pass between the Crown and the prisoner upon his trial perhaps, as in this case, for life and death, the prisoner ought not to be at the mercy either of the Crown or its advisers, but the constitution of the jury should be such as he by law has a right to have it. Now then, seeing no remedy in a case where there would be an actual wrong or prejudice such as that to which I am referring, except by holding that there was a mistrial, it seems to me it is impossible to make a distinction between the case where the prejudice to a prisoner is one that exists in theory and the case where it exists in practice. I wish that there were some procedure in the administration of the criminal law whereby such a case might be disposed of on its intrinsic merits, whereby the facts might be ascertained either by reference to the judge who presided at the trial, or by reference to this court, if it were necessary, whereby the fact might be ascertained whether in reality the prisoner had sustained prejudice or not. But at present no such course that I am aware of presents itself, and the only mode in which such a practical grievance and wrong as that to which I am now referring can be redressed, is by holding this matter with reference to the constitution of the jury to be *strictissimi juris*, and that as the law has given the prisoner a peremptory right of challenge against any man to whom he may entertain even the most imaginary objection which could or might be taken, that he should not be prejudiced by having to try him, a man to whom he would have objected if he had known he was summoned; under all these circumstances, though I regret, that in a case where no practical wrong or prejudice is alleged to have existed, we should defeat justice by a technicality of this sort being held to amount to a mistrial, I do not see my way to an opposite conclusion, and I think that at all events *in favorem vite* looking at the serious consequences that might ensue to the prisoner if the contrary was the case, the wisest course is to hold that there has been a mistrial, and that there should be a *venire de novo*.

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POLLOCK, C. B.—In this case it appears that after the trial was over, and after sentence had been pronounced on the prisoner, it was stated on the following day to the judge who presided at the trial that one of the jurors returned on the panel had answered to a wrong name, and had been sworn without having been called. No inquiry seems to have taken place on oath, the matter has been assumed to be true on the statement of the officer of the court, and neither the judge who presided at the trial nor this court has any judicial knowledge of the facts which

gave rise to the objection, if objection it be. Now apart from the statute, which creates this tribunal, namely, the 11 & 12 Vict. c. 78, the objection, if any, could not have been taken except on a writ of error, and the error, if error it be, is error in fact and not error in law. In my judgment the statute was clearly not intended to supersede the court of error and to confer upon this court all its functions. This is perfectly clear by the 5th section of the act, which provides for a case before a court of error and gives to the court of error a power that it did not possess before. And in one case, which for another purpose I shall presently have to allude to, it was expressly held that this court ought not to interfere upon a demurrer, ought not to deprive the prisoner of his right to a writ of error upon demurrer; and therefore I may consider it, that the court of error, by the decision of that case and by the express words of the statute, remains clothed with the full authority that it possessed before the statute was passed. The authority and jurisdiction of this court is in my opinion limited to matters of law arising upon the trial, of which the judge can take judicial notice; and in providing for giving effect to the decision of this court and the certificate founded thereon, there are express directions given as to what shall be done in each case. It appears to me that the statute under which we are now sitting contemplated the final determination of the matter and never contemplated any new trial or any *venire de novo*. The language of the act, I think, naturally leads to that conclusion: it is this, "Thereupon the said justices and barons shall have full power to hear and finally determine the said question or questions, and thereupon (this is what they have power to do) to reverse, affirm, or amend any judgment which should be given on an indictment or inquisition on the trial whereof such questions have arisen, or to avoid such judgment, and order an entry to be made on the record that, in the judgment of the said justices and barons, the party convicted ought not to have been convicted." Such I understand to be one of the entries my Lord Chief Justice of the Court of Queen's Bench proposes to enter upon the present occasion. "Or they may arrest the judgment, or they may order judgment to be given thereon at some other session of oyer and terminer and gaol delivery, if no judgment shall have been given before that time, or they may make such other order as justice may require." My Lord Chief Justice appears to think that this authorizes us to order a *venire de novo* to issue. Upon the best consideration I can give to the question it appears to me to confer no such authority. It appears to me that the statute never contemplated any new trial, and I think that will appear when we come to consider what are the provisions made in the act, for they are very express and direct, as to what shall be done upon the certificate going down to the court in which the point arose. One could not expect as to a statute so recently passed much of authority upon the question; but I observe that Mr. Baron Parke, now Lord Wensleydale, has expressed an opinion upon what is the meaning of these very words, namely, "shall make such other order as justice may require." In the case, which I alluded to just now, *Reg. v. Faderman* (1 Den. C. C. 561), in which the prisoner was left to his writ of error, upon the demurrer, the court thinking they had no power to deal with the demurrer, I observe in page 568, that Mr. Baron Parke says this, "The words 'to make such other order as justice may require,' do not assist; they only enable this court to order the party to be let out on bail or to do any other thing of the like nature which justice may seem to demand;" and if this part of the act which enables

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the court to make any other order "such as justice may require," authorizes us to award a *venire de novo*, I should be glad to know why we cannot grant a new trial in any case where improper evidence has been received, but which in reality was not calculated to have any influence upon the verdict, or which, if it had not been received, would have left the case against the prisoner more clear than it was with it. If we are to award a *venire de novo* because the prisoner may have lost some benefit, of which certainly there is no suggestion before us, then I would ask, in a case where improper evidence has been received in the opinion of the court, and where the entry upon the record would be that the evidence having been received the accused party was improperly convicted, what does justice require in such a case? why, manifestly, that the prisoner, guilty of some atrocious crime, should not escape justice because the judge received some improper evidence, but that he should be tried again. And yet I apprehend it will be conceded on all hands,—I do not imagine, from the communications that have taken place among us, that one single member of this court is of opinion that however much we might all think that justice would require a new trial, we should be competent to grant it where improper evidence had been received or some similar matter had occurred which rendered the conviction in the judgment of this court invalid. The act of Parliament provides expressly what shall be done where the conviction is vacated. We cannot order a new trial in this case—we cannot direct a *venire de novo* to issue without vacating the conviction. And now I come therefore to the second point which I alluded to, namely, the provision which is made for giving effect to the decision of the court and the certificate founded upon it, which must be signed by the chief of the court who may happen to preside here. It is expressly provided by the statute what shall be done in each particular case. That is to be found in the latter part of the second section, and I will read the very words of the statute, "And the said certificate shall be a sufficient warrant to the sheriff and all others for the execution of the judgment, as the same shall be so certified to be reversed, affirmed, or amended, and execution shall thereupon be entered on such judgment, and for the discharge of the person convicted from further imprisonment if the judgment shall be reversed, avoided, or arrested." Now this difficulty may arise if we send back a certificate that this conviction is bad. I am not sure that the man is not entitled to a *habeas corpus* to know why he is detained, and why the sheriff does not instantly discharge him. And most serious questions might arise, whether he ought not, upon the plain, manifest, and clear words of the act, instantly to be discharged. There is no provision made for detaining him. There is provision made for everything which really is contemplated by the act. The sheriff is called on to discharge him if the conviction is avoided. "And in that case such sheriff or gaoler shall forthwith discharge him;" in the event of the judgment being affirmed or amended, the execution is to issue upon the judgment so affirmed or amended. But there is not a syllable in the act that points to any power in the sheriff or anybody to detain him, or in any court to try him in the event of a *venire de novo* issuing. On these grounds, in my judgment, this court is not competent to award a *venire de novo*; and I think the remark made in the case I have already cited that the prisoner ought not to be deprived of his writ of error, applies with equal strength to the other side—the case of the prosecution. Why are we to dispose of a matter of fact which has never been tried? I am

not aware that it has ever been inquired into on oath. There is no return, or any affidavit, or any statement made on oath by anybody that the facts are true; and why is the Crown to be deprived of the opportunity it would have on a writ of error of saying and proving that the suggestion made in the case before us is not founded in fact, or, if there be no doubt of the fact, that it was a matter of fraud between the accused and the juror, which possibly might very much interfere with the decision of the court. In my judgment the prisoner ought to be left to his writ of error, and as that is my opinion in point of law, giving to this statute my most anxious and deliberate consideration, I abstain from giving any opinion whether a writ of error ought or ought not to be granted, or what ought to be the result of a writ of error if it were granted, assuming the facts to be true. These matters are not in my judgment properly now before the court; and I think it best to abstain from giving any opinion about it. In my judgment this court has no authority to interfere and certainly has not,—I must say I express this opinion without the slightest doubt or hesitation, that this court has not any power to award a *venire de novo*, and in that way grant a new trial. I think the awarding of a *venire de novo* belongs exclusively to a court of error; and if it is to be awarded by this court, I think that in so construing the words which have been referred to—"to make such order as justice may require"—the court is not expounding the act, which alone it has the power to do, but is in fact legislating and taking to itself an authority which the Legislature never intended to confer upon it.

COLERIDGE, J.—I have considered this case with all the attention I Coleridge, J. have been able to give to it and which its importance deserves; and certainly the conclusion at which I have arrived, it being a very clear one in my mind, I should entertain without any serious doubts, but for the doubt expressed by my Lord Chief Justice, a doubt which I apprehend prevails among several members of the bench, and perhaps more for the energetic opinion we have just listened to from the Lord Chief Baron. Still I remain of opinion that this is a case within the competency of this court to consider. And I arrive at my conclusion as to this, and as to many parts of the case that I shall have to touch on, perhaps by a shorter mode than has been adopted by my Lord Campbell on the one hand, or by my Lord Chief Baron on the other; because I do it very much upon a consideration of the statute under which we are sitting. Now if this be a question of law which has arisen upon a trial, and if the judge who presided at the trial has reserved a case for us, it appears to me that it must be within our jurisdiction to consider it. Now, that it is a question of law, I think hardly admits of an argument. If the prisoner being aware of the fact at the time, had started the question, and if, on the other hand, the counsel for the Crown had discovered that the jury was not impanelled according to the statute, who can doubt but that the point at the time must have been a point of law for the judge to decide. Well, then, did it arise at the trial? It was not agitated at the trial beyond all doubt; but at the same time I understand it, construing this act of Parliament as I think we are bound to do liberally, to be a question of law arising at the trial, whether it be a subject-matter of dispute or controversy at the trial, or be considered at the time, or whether it be considered at a later period, I understand it to have arisen as a question of law, if the fact upon which it is founded took place in the course of the trial. Now let me illustrate that by a case which I am sure has occurred within my own recollection on

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several occasions in this court, though undoubtedly the matter has never been discussed; and, therefore, I do not cite any of these cases as authorities; but let me suppose the case of a prisoner undefended, who is tried at the assizes before a judge; he has no counsel; nothing arises in the mind of the judge; the case is proved; the judge sums up, and the prisoner is convicted; but the next day, or a day or two after, the judge, upon reconsidering the matter, is of opinion that he has seriously misdirected the jury on a point of law, has laid down the law to them wrongly, has committed a mistake by omitting something which is of great importance to the prisoner,—is not that a question upon which, if he has a doubt, he has a right to take the opinion, under this act of Parliament, of the judges? And could it be said that the point which, beyond all doubt, ought to have been determined at the trial, and which did present itself for consideration at the trial, is not a point that arose at the trial? I think, if we were to hold that a case of that nature is not within this act of Parliament, we should most grievously impair the operation of the act of Parliament which, as much as any other that has passed for a long period of time, ought to receive the largest and most liberal construction. Now, if I am right in that supposition, in the case that I put, it appears to me that this was, like that, a question that arose upon the trial. It is said, and though I have not thought it necessary to state the facts of the case, I must take the liberty here of correcting something that has fallen, I think, from my Lord Chief Baron,—it is said how are we to arrive, or how do we arrive at our knowledge of the fact in this case. My Lord Chief Baron said that we only knew that a statement was made to the judge, that it was a matter about which he had no judicial knowledge, and that nobody can now take on him to say whether or not the facts which are presented for our consideration are correctly stated or not. Now, the judge says this: "It was, however, discovered the next day" that so and so took place. I apprehend we are bound under this act of Parliament to give credence to the statement of the judge; and whatever the judge presents before us, we must take as a fact. The judge does not put the fact on some uncertain and hearsay evidence of a matter that has come to him; he states to us that it was discovered the next day that so and so had taken place. The judge states that which, in his mind, presents a doubt for consideration in this case, and his statement must be taken incontrovertibly as fact. It is suggested this is not a record. But we have no more power of contradicting the statement of a learned judge than we have the power of contradicting any allegation upon a record. Now, if it be a matter in which we can arrive at the facts of the case, it seems to me, I confess, to relieve the case under consideration from much of the technicality that might otherwise be supposed to belong to it; and for that reason it is, and without at all expressing an unfavourable opinion of the result of the cases my Lord Chief Justice has gone through, I take the liberty of passing them by, and I take my stand on the act of Parliament. I say, that I care not at all whether this would have been a matter of challenge, or matter of error, or matter to be assigned on error, or whatever it may be, if it be brought before us for our consideration, we are to say what are the legal consequences of the facts presented to our notice. Now, if that be so, it appears to me that there has been clearly in this case a mistrial, and that justice requires us to interfere and to say that there has been such a mistrial; and though it may be extremely possible that in this case no injustice has been done, I must take leave, with reference to what fell from my

Lord Chief Justice, to state that, in my opinion, that is hardly the right mode of considering the importance of any question presented to a court of justice; it is not whether in any particular case injustice has or has not arisen; we know nothing about that; we only know that under that state of circumstances injustice may have arisen, hardship may have resulted; and if that be so, the prisoner is at liberty to stand upon that ground and say I am not to be submitted to a state of things in which injustice or hardship may have arisen. That that may have been the case is too plain to require any statement at my hands; and therefore I pass on from that part of the case. Now, then, I am quite aware that the decision to which I have come may open the door to a great many abuses and to fraudulent practices; it may be suggested that the consequence of what has now fallen from the court, supposing that should be the opinion the court entertain, may be to open the door to a great deal of collusion and deception from persons going into the box and answering to the names of other persons, but to that I would answer very much in the terms used by my Lord Chief Justice Abbott in the case of *Rex v. Tremearne*, that may be so, and no doubt personation may take place and mistakes may arise; or there may be collusion, and so injustice may arise; we must do our best to prevent such things arising; but, above all, we must lay down the rule strictly and take care that the rule be such as to secure, if properly carried out, the true ends of justice. It only then remains for me to consider what we ought to do in this case. I listened with great attention to the proposed form of entry that my Lord Campbell stated towards the conclusion of his judgment. I am not prepared to say that I see anything to find fault with in that; but it appears to me it is hardly necessary for us, perhaps, to go so far as to say anything in point of form about a *venire de novo* being awarded. I do not say that upon the grounds on which my Lord Chief Baron relied with reference to the 5th section of the act, and to what is there said about a court of error having the power to award a *venire de novo*, as showing that we have no such power. That section seems to me to be placed in the act of Parliament for a very different purpose. No doubt this act of Parliament does not take away the writ of error. This act of Parliament only applies to cases where the judge chooses to reserve a case, and that matter is wholly in the discretion of the judge; therefore there may be a writ of error undoubtedly; it augments the power of a court of error, but it does not at all interfere with the writ of error; nor does the circumstance of the court of error having the power, show that this court has not the power also. I think if we pronounce that there has been a mistrial, it is precisely the same as if there had been no trial; and all that is passed and done is void and at an end, and the prisoner's name will be entered on the calendar again as a person waiting there to undergo a trial. I do not apprehend that any special award of a *venire de novo* is necessary in this case to carry out the ends of justice, nor am I afraid, as has been suggested in the course of the discussion we have heard, that the record, when complete, would be an erroneous record, because I think whatever we do lawfully under this act of Parliament never can be assigned as a cause of error in any court of error; the act of Parliament will protect and make legal whatever it authorizes us to do. Therefore, without saying there should be an award of a *venire de novo*, perhaps we should arrive at a less objectionable conclusion in point of form if we were to say simply that there had been a mistrial, upon which the same legal result, namely, a second trial

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would follow, as if we were at once to direct it. Upon all these grounds I am of opinion that there has been a mistrial in this case; that the conviction was wrong and ought not to stand; and that the prisoner must be again tried for the offence. And let me, before I conclude, observe, that so saying, and in so determining this question, we defeat no ends of justice at all; we merely submit the prisoner again to a second trial. It does not follow that there will be an acquittal now any more than there was an acquittal on the former occasion; we merely say the man has not been properly tried, and he is now to be submitted to his trial.

WIGHTMAN, J.—The opinion which I entertained at the time when this mistake was discovered remains the same; the mistake was not in the name of a jurymen, which would be a misnomer only, but in the person. It is the case of one juror, to whom the prisoner at the bar might have had an objection, answering to the name of another juror to whom the prisoner might have had no objection, and being sworn and trying the case in the name of such other person. Such a mistake might render the prisoner's right of challenge nugatory, and it is settled law that unless a jurymen be challenged before he is sworn, he cannot be challenged afterwards, except by consent. It may be that if the mistake had been discovered before the verdict, I might have discharged the juror with respect to whom the objection had arisen, and called another juror, and then have reheard the witnesses; or I might have given the prisoner the liberty of challenging the juror who actually served, which might have been done with the consent of counsel for the prosecution. The mistake, however, though arising upon the trial, was not discovered until after verdict, by the wrong jurymen having been in the box. It appears to me, therefore, this was a case of mistrial, and that if the privilege of the challenge be of any value at all, it might be utterly defeated in case this objection does not prevail. This is distinguishable from the Jurymen's Case reported in 12 East, 281. That case seems to have been one of misnomer only, the right man having answered to a wrong Christian name, there being no other jurymen of the same name on the panel. In the present case, Joseph Henry Thorne was called, and this person whom the prisoner was competent to challenge, and who was supposed to have been sworn and to have tried the prisoner, neither was sworn nor did he try the prisoner. The case seems to me, in effect, much the same as if he had been tried by eleven only. The consequence of a mistrial is, that the prisoner may be tried again, as he never was in legal contemplation in jeopardy upon the first, which is not to be considered a trial at all. It may be, and no doubt is so, that such an objection as this may be a ground of error that might be taken upon a writ of error; but the question is, whether, notwithstanding it might be a ground of error, this court has not jurisdiction in this case. Now I refer to the recital in the act under which this court sits—"For the further amendment of the administration of the Criminal Law;" and it commences with this recital: "And whereas it is expedient to provide a better mode than that now in use of deciding any difficult question of law which may arise on criminal trials in any court of oyer and terminer and gaol delivery, and to make further amendment in the administration of the criminal law." This act was passed for the express purpose of providing a better mode of deciding difficult questions of law. No doubt difficult questions of law, arising upon a trial, might be ground of a writ of error; but this was to provide a better and shorter and more expedient mode, as the Legislature suggests, of deciding such

questions, and therefore it seems to me that a power is given to this court by no means limited in the manner suggested by Mr. Baron Parke, in the case referred to by the Lord Chief Baron. The provision of the act is, that any questions of law arising upon a trial may be reserved for the consideration of this Court, who have full power to determine the question, and may avoid any judgment. I think, the words are "they shall have power to affirm or amend any judgment which shall have been given, or to avoid such judgment." Now, this is one of those cases in which the court have power to avoid the judgment that has been given, and then an order may be made. And the words are these, "or make such other order as justice may require." It seems to me that the terms of this statute give most extensive powers to this court; we may avoid the judgment, or may "make such other order as the justice of the case may require." Giving, then, full effect and a fair construction to those words, it seems to me this court has power, if they think the case is one in which they ought to exercise it, to make such order as they think fit and justice may require, which is in this case that there should be another trial. It seems to me, upon those words, giving my own opinion, that this court has ample jurisdiction to avoid the judgment, and in the terms of the act, to make such other order as justice may require; and that being so, to order that there be another trial. On these short grounds, I am of opinion, first, that this is a case of mistrial for the reasons I have stated; and, secondly, that this court has authority to order a new trial; and, consequently, that judgment should be given avoiding the judgment and ordering another trial.

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ERLE, J.—I will first take the substantial question, whether a writ of Error lies because William Thornley by mistake answered and was sworn on the jury when Joseph Thorne was called by the officer, both names being on the panel, and both persons being duly qualified to serve, and no actual prejudice to any party being shown. It is alleged that the prisoner may have intended to challenge Thornley, and have lost the opportunity because the name of Thorne was called, and that this possible loss of challenge is error vitiating the trial. No authority has been adduced to show that such a mistake has ever been held to be a ground of error, and although there are many instances at *Nisi Prius* where there has been a misnomer of a jurymen, and where there has been a personation of a jurymen by an unqualified man not on the panel, no case has been cited where the man who served and the man who was called were each on the panel and each qualified to serve; and no case has been cited where either misnomer or personation was introduced on the record by assigning it as error in fact, to be proved by evidence extrinsic to the record. Among the cases cited *Norman v. Beaumont* (Willes, 484), was much relied on, but it falls within the description above given. There one "Yater" was returned on the panel, and "Shepherd," who was not returned, answered to Yater's name by mistake, and was sworn. And upon showing cause against a rule for a new trial on this ground, it was contended that the record was right, and the court could not notice a defect not appearing thereon; but the judgment was, that in cases where the objection could not appear on the record, the court always (that is on motions for new trials) admitted affidavits as in the case of any misbehaviour of a jury. In the old cases the motion in arrest of judgment is founded on a variance in the name of the same juror appearing in different parts

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of the jury process, and if any extrinsic fact is brought forward, it is by affidavit on an application to the discretion of the court, either to amend or grant a new trial at Nisi Prius, such applications to the discretion of the court being distinct from a ground of error, entitling to a judgment *ex debito justitiæ*, and being in the nature of an application to the discretion of the Crown for an act of mercy. I cite the cases of variance appearing on the record from the collection in *Wray v. Thorn* (Willes, 488). In *Displyn v. Spratt* (Cro. Eliz. 57), "Thomas Baker" in the *venire* was called "Thomas Carter" in the *distringas*. In *Fermor v. Dorrington* (Cro. Eliz. 222), "Taverner" in the return to the *venire* was "Turner" in the *distringas*. In *Dousby v. Willott*, Gregory in the return to the *venire* was George in the *distringas*. In Cro. Jac. 116, "Constantinus" in the return to the *venire*, was "Constantius" on the panel. In *Codwell's* case (5 Co. 42b), "Palus" in the return to the *venire* was "Paulus" in the *distringas* and *postea*. In these cases the judgment was arrested on account of the variance appearing on the record. In the more modern cases the application was for a new trial on affidavit; it was so in *Norman v. Beaumont*, above cited. So also in *Wray v. Thorn* (Willes, 488), "Henry" in the *venire* and other jury process was shown by affidavit to be Harry; the judgment is that there should be no new trial. The court says, that the record being right, and no variance appearing thereon, the judgment cannot be arrested or reversed on error, and that it would be unjust to grant a new trial there being no objection to the verdict, and it appearing by the affidavit that the jurymen who was sworn was the person who was returned, and Willes, C. J., adds at the close, "this case is very different from *Norman v. Beaumont*, for there a person who was never summoned was sworn in the room of one who was summoned." According to these authorities a misnomer appearing on the record is always ground of error if not amended; but it is no ground of new trial if the person who was sworn was a person that was summoned, and no injustice was done. The cases further show that if a person not summoned was sworn in the name of one who was summoned, it might or might not be ground of new trial, according to the discretion of the court. Thus, in *Hill v. Yates* (12 E. 229), where the father was summoned and the son answered and was sworn, Lord Ellenborough expressly, because a new trial was for the discretion of the court, refused the rule, there being no pretence of any prejudice, and the danger of abuse both in civil and criminal cases being incalculably great if such a motion prevailed. So in *Reg. v. Tremearne* (5 B. & C. 255), where the father was summoned and the son answered and was sworn, and it was also shown that he was an infant without qualification of estate, the court thought these facts a sufficient ground for granting a new trial. And in *Dovey v. Hobson* (2 Marsh. 155), where "Mayard" answered to the name of Russell, he having received a summons directed to Russell, or the inhabitant of Russell's house, and he having succeeded to Russell's house, the court granted a new trial on the alleged ground that the objection had been taken before verdict, but probably because the verdict was unsatisfactory, as the report states that it was against the summing up of the judge. These cases thus show that if a person not upon the panel answers to the name of a person on the panel, such personation may or may not be ground of new trial according to the discretion of the court. They do not support the notion that if a jurymen on the panel by mistake answered to the name of another jurymen thereon, it would be ground of new trial, much less do

they indicate that such a mistake could be made ground of error. Moreover as they relate to verdicts at Nisi Prius, they differ materially from a verdict under a commission of oyer and terminer. With respect to such a verdict one case only has been found, namely, the Case of a Juryman, reported in 12 East, 231, where "Joseph Currie" answered to the name of "Robert Currie" on the panel, and the conviction was affirmed by twelve judges unanimously, the summons having been served on "Joseph Currie," and the bailiff intending that he should serve. This unanimous opinion of the whole body of judges is decisive against the principle relied on for the prisoner, namely, that the variance between the name of the person called, and the name of the person sworn, may have misled him in his challenge; for inquiries about "Joseph Currie" would be as irrelevant to challenging "Robert Currie," as inquiries about Thorne would be irrelevant to Thornley, but the variance was decided to be neither ground of error nor of summary application, and Lord Ellenborough, afterwards citing the case, forcibly points out the mischief if such variance was held to vitiate a verdict. If the present case is to be decided without reference to authority, by recourse to the principles of justice, the allegation that a party may have been misled in his challenge is insufficient for setting aside a verdict returned by twelve qualified men sworn in the presence of the parties, and open to any peremptory challenge *super visum*, and if a ground of error is to be created by alleging error in fact, the allegation ought to go further, and show that the party complaining had sustained some actual prejudice from the mistake. For, suppose the parties reversed, if the mistake is ground of error for the prisoner, so is it also for the prosecution; and if the prosecutor claimed a new trial on the ground of such a mistake, all would agree that he ought not to succeed unless he could allege actual prejudice. The possible hardship of having lost a challenge from ignorance is no ground for vitiating a verdict, as was said in *Reg. v. Sutton* (8 B. & C. 418), where an alien was sworn on the jury without the knowledge of the defendant, and a new trial was refused. Thus far I have considered the question as if the court was in the present state of the record fully qualified to decide whether a *venire de novo* should be granted. But that writ is not lawful without an entry on the record showing a valid ground for issuing it: (see *Carver v. Shew*, 4 M. & W. 167.) If in this case it issued without legal ground appearing on the record, the new trial would be erroneous, and the verdict thereon no ground for judgment. It is therefore necessary to consider what entry could be made, whether casual information to the judge of the mistake gave him legal knowledge of the fact, so as to authorize him to direct the officer to enter it on the record after the verdict has been recorded, and the jury has been discharged. The entry must be according to the supposed fact, and ought to be traversable, so that the truth should be legally ascertained; that entry is essential for a judgment in error, and I cannot assent to the notion that every judicial officer who tries an indictment may receive a rumour, and if he believes it, make an entry accordingly to vitiate a record otherwise correct, and so bind other parties and courts by an assumption which may be disputed. Thus, in point of substance, there is no ground of error, and in point of form, no ground of error appears on this record. Further, the statute creating this court gives no jurisdiction over a ground of error, certainly not over a mistrial where a verdict is to be set aside and a *venire de novo* awarded. The provisions of the 11 & 12 Vict. c. 78, are in terms confined to judgment after conviction. There is no authority given to

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alter the verdict in any way, none to treat a verdict as a nullity, and to grant a new trial. The authority is express to vary the judgment in any way, and even to enter an adjudication that the prisoner ought not to have been convicted; but the verdict is to be left to stand, notwithstanding such entry. It is true there is a general power to make such order as justice may require, but this general power follows after specific powers relating to judgments only, and the general words are to be restricted by the preceding words and construed to be *ejusdem generis*. It is also to be noted that by sect. 5, the jurisdiction of courts of error is expressly preserved in respect of errors appearing on the record, and it is therefore probable that cognizance of grounds of error was not intended to be conferred on the court which was substituted for the meetings of the judges in former times, in which meetings grounds of error were not considered. The present objection is, if any, a ground of error, in my mind, which must appear on the record; and on these grounds I am of opinion that the appeal should be dismissed.

Williams, J.

WILLIAMS, J.—I am of opinion that no *venire de novo* ought to be awarded in this case, because I think it does not fall within the stat. 11 & 12 Vict. c. 78, under which we are here met. I am of opinion that the point which has been raised for our consideration is not a question of law which arose at the trial within the meaning of the act. It appears to me that it must be treated as occurring after the verdict. If the alleged mistrial could have been cured by verdict, it would have been helped by the verdict which has been given. I do not mean to say that I think it has been so helped in this case. I only mention this to show that the point as it stands before us, must be regarded as a point occurring after verdict. If that be so, it seems to me to follow that it is not a question of law which has arisen at the trial within the meaning of the first section of the statute. The questions contemplated by the act, are questions which the judge before whom the case is tried may reserve in his discretion. But he cannot reserve a point which he could not have decided finally, even if he had been so minded. Now, in the present case, if the point had been one which could have formed a ground for arresting the judgment, the presiding judge might have decided it. For I do not mean to say that such a point may not be regarded as arising at the trial within the meaning of the statute. But a point like the present could not be raised in arrest of judgment. It could only in the ordinary course of law be made the subject of a writ of error in fact. And I am of opinion, that it was not intended by the statute to substitute this court for a court of error as to errors in fact. I do not see anything in the statute that enables the presiding judge to collect the materials for such a tribunal. It is said that the point was brought to the attention of the judge while he was still acting under the commission in the assize town. But I am at loss to know what power his commission gave him to act in the matter. I think he might just as well have acted after as during the assizes. There is no doubt that if his object were only to recommend the prisoner to the Crown for a pardon, on the ground that he had not been fairly tried, the judge might collect information for the purpose at any time, and from any source on which he thought it right to rely. But when the object is not to procure a pardon, but to ascertain whether a *venire de novo* ought to be awarded, on the ground that there was error in fact, constituting a mistrial, I can see no function which the presiding judge at or after the assizes has to perform in the matter, or which it was meant by the statute to transfer from him to this

court in any event. It may, perhaps, as some are disposed to think, be expedient to alter the common law course of proceeding for obtaining a *venire de novo* in criminal cases, and to deprive the Attorney-General of his discretion whether he will allow a writ of error, and to deprive the Crown of the right of controverting the facts which are assigned as error. But I am of opinion that in order to effect such an extensive alteration of the law, it requires much more direct and explicit words than are to be found in this statute. The opinion I have thus expressed makes it unnecessary for me to consider the question, whether, if the facts stated for our consideration by my brother Wightman had appeared on the record on a writ of error, there ought to be a *venire de novo*. It would be unbecoming in me, aware as I am of the conflicting opinions of my brother judges, to treat this question otherwise than as a very doubtful one. I will only observe, that if the facts stated for our consideration had been assigned as error in the ordinary course, the question might have assumed a very different aspect if the Crown had pleaded in answer to them (as perhaps it might) that the jurymen, William Thornley, was personally well known to the prisoner, and was seen by him to go to the book to be sworn, and that he never had any intention or wish to challenge that man. For these reasons I am of opinion that a *venire de novo* ought not to issue, and that this court ought to make no other order than that the conviction do stand.

MARTIN, B.—I am of opinion that there was a mistrial in this case. I think the prisoner is entitled to have the names of the jury who try him correctly called in open court, in order that he may know the names of every one by whom he is tried; and in my judgment, without this privilege, the challenging of jurors would be an idle ceremony. The reason which is urged for not giving to the prisoner this right is, that he is supposed to know the persons of the jurors who are called upon the trial. In point of fact, he has no such knowledge; and it seems to me that to assume that the prisoner knows the persons of all the jurors on the panel, or all the persons who are returned to serve as jurymen in the county, would be a fiction worse than any I am aware of, many of which are now abolished. I am, therefore, of opinion, that there was an absolute defect in the trial of this man, by reason of his being tried by a jurymen whose name was miscalled; and whom, therefore, in my judgment, he had not an opportunity of challenging, which he ought to have had. I have heard another reason urged for depriving the prisoner of what I conceive to be this right, that it may lead to inconvenience by reason either of collusion, or of persons getting into the box to try prisoners in the same manner as the jurymen did in the present instance. But to my mind, to found any judgment on possible carelessness and negligence of officers, or to give any protection of that kind, is not at all a ground which we ought to take into our consideration. The only result of that is, that all judges ought to be careful to enforce on the officers of the court to take care that the jurymen who go into the box are the persons actually named and called. That is my judgment and opinion. In this case it would be a mere waste of time to go into the cases which have been so fully gone into already by my Lord Chief Justice, and in my judgment and opinion there was a mistrial in this case. Well, that being so, the next question to be considered is, how is this to be taken advantage of? And I apprehend it would be certainly error, and the error was to my mind error in point of fact. The act of Parliament certainly preserves the prisoner's right to assign error of fact on a writ of error;

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but I am also of opinion that he is entitled to have it put upon the statement of a case reserved by the learned judge who tried him; and it is my opinion that unless we consider this statement of the judge as absolute verity, we shall get into confusion with respect to this act of Parliament, and I do not know where it is to stop. The judge is the person to state the case; and, in my opinion, we ought to take his statement precisely as a record, and act on it in the same manner as a record of court, which of itself implies an absolute verity. I have always understood that this act of Parliament was passed for the purpose of amending one of the greatest scandals that existed in the law, that whilst in civil cases the most minute possible mistake, or the wrong admission of the most paltry piece of evidence, or the rejection of any immaterial matter, would entitle the parties, as of right, to a new trial, in matters where a person's life depended upon it, as in this case, he was prevented, without accepting a most circuitous and difficult course, from getting any error of law amended. I have always understood that this act of Parliament was for the purpose of doing away with what I consider to have been a great scandal on the law. I entirely concur with my Lord Chief Justice of the Common Pleas, and my brother Coleridge, who think that we ought to give a most liberal construction to this act of Parliament, and instead of limiting it, to extend it as far as we possibly can, for the purpose of giving the prisoner the right which the law confers on him. Now, as this act of Parliament gives an express power to us to arrest the judgment, that is, to decide upon the record as it stands, that there is error; for an arrest of judgment could not be awarded except for error; at least I am not aware of any ground for arresting the judgment except that which would be error; as we have that precise power given by the act of Parliament, it seems to me, that the best way we could exercise that power, is to make such order as justice may require in every case where, upon the facts sent to us by the judge, which, as I have said already, I consider to imply absolute verity, there has been any mistake or any error on the trial. I am not satisfied myself that the proper mode of proceeding would be by ordering a *venire de novo*; and my impression is, that if the matter were material to be considered, or important to be decided, the proper mode would be this, to direct that there be entered upon the record the case stated by the judge, and then to enter, not a *venire de novo*, but an order of this court that a trial should take place in consequence of the previous one being a nullity. It is only a variation in words; it comes to the same thing. But my impression is, that if it becomes necessary to make an entry upon the record in this case, it should be a simple order that the man should be tried again, and that we should get into a mistake if we directed a thing to be done which seems to me much more under the authority of a court of error, acting as a court of record; and the authority given to us by the act of Parliament, in my judgment, ought to be carried out in the plainest, simplest, and most direct form we can, and without reference to any of the old entries that occurred in error. I am of opinion that in this case there was a *mistrial*, and that our entry should be in accordance with the opinion I have expressed that the man might be tried again. I concur with my brother Coleridge, I do not see how this at all defeats justice; in fact, in my judgment, it promotes justice, and gives to the prisoner that right which the law distinctly has conferred upon him.

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CROMPTON, J.—I am not satisfied that there is any ground in point of

law upon which we ought to interfere with this conviction. The present seems to me one of those cases where an irregularity has occurred in the course of the proceedings which does not necessarily vitiate the verdict, but where the courts in which the record is, in a civil action, or the Crown, in the exercise of its prerogative, may interfere, if any unfairness or real prejudice has occurred, but where such interference is only matter of discretion. The person who served on the trial was a qualified person returned by the sheriff to try the prisoner, and the objection was that another person of a somewhat similar name, also returned by the sheriff, was called, and that the name of the jurymen who served was not called, but he stepped into the box and was sworn, on the supposition that he was the other person, and in his name. He was, however, presented personally to the prisoner, and offered for his challenge, and was sworn without challenge or objection. The argument for the prisoner is, that he may have been prejudiced by supposing from the fact of the name of the other person having been called, that the jurymen he had the opportunity of challenging was the party whose name was really called, and so that he may have lost the opportunity of challenging the jurymen whom he would have wished to challenge. I think the case the same in principle as that of the jurymen in the note to *Hill v. Yates*: (12 East, 230.) It is true that in that case the jurymen in the box was the only one who had been summoned, and the person to whose name he answered was not on the panel, but he was called by the name of another existing person who had lived in the neighbourhood, and whom the prisoner might well have supposed to be the person offered for his challenge, and exactly the same objection made here would have been applicable in that case. The objection is, that the prisoner might be misled or deceived by the name of another party, to whom he had no objection, being called, whilst he might have an objection to and might have challenged the jurymen if he had heard him called by his right name. If the case is not precisely one of misnomer, the alleged prejudice to the prisoner seems to me precisely the same. I am not aware of any authority or case in which the fact, that a prisoner has been ignorant of some matter which might have caused him to challenge a person who comes to the box to be sworn, has been held to vitiate the verdict in point of law; and I apprehend that it would not do so, even if it appeared that the prisoner had been purposely misled, though it would be matter for the consideration of a court in a civil case, in exercising their discretion as to the granting a new trial, under all the circumstances of the case, or for the advisers of the Crown, in the exercise of the prerogative of mercy. The judge or court at the trial, through their officers, must take care as far as possible that the due course of proceeding is properly observed, but it would be most mischievous if every irregularity of this nature, however happening, and even if contrived by or assented to by the prisoner or his friends, would necessarily vitiate a verdict. If it would necessarily have that effect, the same principle would apply to the case of an acquittal, even though the irregularity were caused by the prosecution. The principle of inconvenience must not, however, be carried too far, as there are cases not very dissimilar to which it would apply, where there is authority that the proceeding would be erroneous, as, for instance, the case mentioned in 2 Hale's Pleas of the Crown, 296, where it appeared upon the record that by mistake eleven only of the jurymen had been sworn; but the extreme mischief should make us cautious in seeing that the strict rules of law

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are not extended in such a manner, that at every assizes and sessions we should be in danger of hearing of verdicts being set aside by accidental or contrived irregularities like these in question. I am not aware that any case has carried the doctrine so far as would be necessary to support the objection in question, and in no criminal case has any similar objection prevailed that I am aware of. The case of *Rex v. Tremearne* (5 B. & C. 254), was different, being the case of a party not qualified to act as a jurymen and not on the panel, and being a case where the Court of Queen's Bench, in which the record was, were exercising their discretionary power of granting a new trial. But, even supposing the objection in some shape to be well founded, and considering the doubts entertained by so many of the judges, and the authorities they think applicable to the case, I am far from speaking of the present as a case not admitting of doubt, still I do not see that we are in a position to act upon it in the manner suggested. It is proposed, as I understand, to reverse the judgment and award a *venire de novo*; we are not now sitting as one of the superior courts in Banc, discussing whether, in the exercise of our discretion, we ought, on affidavits satisfying us of the facts, under all the circumstances to grant a new trial, as in that class of cases, where questions of this kind have generally occurred, and which I do not think applicable to the question before this court. Neither is the case one of the class of cases where there is a variance in the record, as in the instance of there being one name in the *venire* and another name in the *distringas* in the jury process in a civil action; to cure which in some cases the statute of Jeofails of Hen. 8 contained some provisions not applicable to criminal proceedings. Nor have we the record before us showing any mistake as to the calling or swearing the jurymen. The books are full of authority to show that no *venire de novo* can issue except on matter appearing on the record sufficient to justify such award, and if it be improperly awarded it is error. Very serious difficulties might arise if there should be a second conviction, and on error brought the prisoner should say that the reversal by this court might be right, as perhaps founded on the evidence not showing that the legal offence charged was committed, but that there was nothing on the record to warrant the award of the *venire*. This court has certainly never yet awarded a new trial, even in cases where the justice of the case would be best met by a new trial. Even in the cases in the old books, where the courts have allowed matter arising after the swearing, and before the giving of the verdict, as to the misconduct of the jury, to be suggested, they require it to be upon the record before they will act upon it. In *Hillard v. Hall* (2 Roll. Rep. 262), all the justices say that they ought first to see that a record be made of this for the matter to appear upon the record for which the judgment shall be "stayed et si nous agardamus un novel venire, quant tuel matter ne reason appart sur le record, le posterity voile admirer al nous, and because no record as yet made of this, but only of the notes of the clerk, it was adjourned until it was put upon the record." In the case of a challenge being overruled improperly, it is quite clear that it must appear upon the record before the overruling can be treated as error; and I apprehend that it must either be recorded during the trial, or some minute made of it from which a record can be subsequently made to justify the officer. I will not undertake to say how far any such objection as the present could properly be put upon the record, if a writ of error were brought, and the judgment and proceedings had to be

formally entered on the record. In many cases, where the objection if made might have been amended at the time by an alteration or amendment of a name in the panel or minute, it might be very doubtful whether the minute of the clerk, from which I presume the record should be made up, ought to be departed from, and if the matter be inconsistent with the record, it could not be assigned for error, as, where in the passage before referred to from Hale's Pleas of the Crown, 296, it appears that if a jurymen be returned as sworn, it cannot be assigned for error that he was unsworn. This might possibly be obviated by some direction that the matter might be stated on the record according to the fact and truth, or it might be thought that the fact was not inconsistent with the allegation on the record; but, however that might be with regard to a court examining alleged matters of error on the record, I think that the course we are asked to take would tend to great danger and mischief. Even in cases like those mentioned in 2 Hale's Pleas of the Crown, 307, 308, where matter of the misconduct of the jury is allowed to be suggested upon the record, there seems to have been some examination, probably upon oath; but here we should be proceeding on the alleged fresh discovery of facts after judgment without anything on the record to justify us. If we act without having the record before us in such cases, every court of quarter sessions or assizes may on mere rumour, supposition, or surmise, without evidence, affidavit, or personal knowledge of the judge or presiding officer, certify to us that matter not appearing on the record has come to their knowledge, and ask us on that to award a *venire de novo*, and probably might themselves on the same ground award a new *venire*. In the case of a writ of error and error in fact being assigned, the Crown in the case of a conviction, or the prisoner in the case of an acquittal, would have the right of traversing the matter alleged, and so questioning its truth. I feel great difficulty in seeing how we can act without there being some such opportunity afforded the parties, or at all events without the matter being on the record. These considerations make me concur with those judges who think that we cannot reverse this judgment and order a fresh *venire* or new trial by virtue of the 11 & 12 Vict. c. 78, and upon the whole I am of opinion that we ought not to interfere with this conviction.

CROWDER, J.—I entertain considerable doubt whether this case falls within the statute, and the inclination of my opinion is that it does not. But assuming it to do so, I am of opinion that there has been no mistrial, and that the conviction is right. The single fact raising the point of law in this case is, that when the name of Joseph Henry Thorne was called from the panel of the petty jurors, William Thornley, on the same panel, answered by mistake, and was sworn as one of the twelve jurymen who ultimately found the prisoner guilty of murder. The mistake was not mentioned to the learned judge till the day after the termination of the trial, and the question for us to decide is, whether such mistake has rendered the trial abortive. The prisoner has been tried by twelve men legally qualified to serve as jurors, and whose names had been duly rendered in the panel of petty jurors. There has been no default or neglect in the officer of the court, whose duty it was to impanel the jury, and there is no suggestion that the prisoner has suffered the slightest prejudice in fact, from William Thornley having served on the jury instead of Joseph Henry Thorne. It is further stated by the learned judge, as a fact, that the prisoner was offered his challenge before William Thornley was sworn, and it is quite consistent

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with the statement in the case that the prisoner may have had a personal knowledge of William Thornley, as the individual about to be sworn, but had no desire to challenge him. Before I can arrive at the conclusion that a verdict found by such a jury, so impanelled, is a nullity, I must be satisfied that there exists some stringent and inflexible rule of law which goes the length of avoiding every criminal trial when such a mistake (however unattended with the slightest mischief) has occurred. It is in the experience of every one familiar with criminal courts, that, notwithstanding the greatest caution and circumspection on the part of the officers, such mistakes will occasionally occur, either from the defective pronounciation of strange names, or from the inattention or want of accurate hearing of the jurors whose names are called over. And if there be any rule of law which renders such a mistake *per se* fatal to the verdict, I own I should contemplate with the utmost alarm the awful consequences which might ensue from it to the administration of criminal justice throughout the country. Verdicts found at the assizes and quarter sessions, after the most patient and careful investigation, when the trials have been conducted with the utmost impartiality, and the result has been most satisfactory to the ends of justice, might be set aside, and the prisoners if convicted, might have another chance of escape, or if acquitted might have their lives and liberties again imperilled by another trial. For if such a mistake be fatal to the trial, it is equally so whether the verdict passes for or against the prisoner, and whatever the nature of the crime may be with which he is charged. But I can find no such rule of law. One or two of the earlier cases of civil action were relied on where a similar irregularity was held to constitute a mistrial. But those authorities were fully discussed and considered in the later cases of *Hill v. Yates* and *R. v. Hunt* (4 B. & Ald. 430), and *Earl of Falmouth v. Roberts* (9 M. & W. 469), where it was clearly settled that such an irregularity did not in itself vitiate the trial; but that in every such case it was a question for the discretion of the court whether a new trial should be granted. *R. v. Tremearne*, seems to have but little bearing on this case, as there an infant had been sworn by mistake upon the jury, and Lord Tenterden and the Court of King's Bench decided that there was a mistrial, because the infant was not qualified to sit upon the jury, and so the verdict was not returned by twelve good and lawful men. The Case of a Jurymen in the notes to *Hill v. Yates* (12 East, 231), is not in point as to the facts; because there the only name on the panel of petty jurors was Joseph Curry, which was really intended for Robert Curry, who had been duly summoned to attend. There was a Joseph Curry in existence, but he was not qualified to be on the panel. The name of Joseph Curry being called, Robert Curry, the man really intended, went into the jury box and was sworn and served. It was contended that there was a mistrial, but held by all the judges that there was not, but only a misnomer, which did not invalidate the trial. As regards the main ground, however, on which it is contended before us that there has been a mistrial, the Case of a Jurymen is directly in point. It is said that Mellor's right to challenge was presumably prejudiced, because he may have desired to challenge the name of William Thornley, though not the name of Joseph Henry Thorne, and may have known neither of them personally. And so in the Case of a Jurymen the prisoner might have had cause of challenge against Robert Curry, but none against Joseph Curry, and he may have had his right of challenge curtailed if he knew neither of the men

personally. The trial, however, was held valid by all the judges. I am of opinion, therefore, that there has been no mistrial in the present case, and that the conviction must stand.

WILLES, J.—I am not satisfied that there was a mistrial. The prisoner was tried by twelve men taken from the panel and sworn in his presence, without challenge or objection, and without any default in the court or its officers. If a foreigner had been upon the jury, unknown to the prisoner, the conviction would have been unobjectionable, even though the prisoner were proved to dislike foreigners and to have been sure to have challenged one if known by him to be so: (*R. v. Sutton*, 8 B. & C. 417.) Again, if the juryman had been described on the panel by a wrong Christian name, and had been called thereby in court and sworn upon the jury, the conviction would have been valid: (*The Case of a Jurymen*.) Yet such a mistake might, equally with that in question, have misled the prisoner and prevented him from challenging. I cannot distinguish the present case from those, and I think them correct in principle. Care ought to be taken at the time, that the jury may be composed of persons whom neither the Crown nor the prisoner can justly object to. On the other hand, lest the proceedings should be interminable, the Crown and the prisoner ought to take their objections in proper time, as each jurymen “comes to the book to be sworn.” If this was a mistrial, the prisoner being convicted, it would equally have been a mistrial in case of acquittal. But to order a *venire de novo* in the latter case would be scandalous and oppressive. It is not suggested that the prisoner has not had a fair trial, nor that he has sustained any prejudice. Far from its appearing that he was deprived of his challenge, it is even consistent with the facts that he may have known who was about to be sworn and advisedly abstained from objecting to him. As to the cases relied upon for the prisoner, those who served as jurymen were not upon the panel or returned to serve, and they are, in other respects, already stated by my brother Erle, distinguishable from the present. I am not disposed unnecessarily to add to their number. As to any supposed tenderness and humanity to the prisoner in giving way to such an objection, I have no right to be tender and humane at the expense of the law. If it appeared that the prisoner had not a fair trial he would of course be pardoned. But there is no pretext for that. In this view of the case it may be unnecessary to express an opinion upon the construction of the stat. 11 & 12 Vict. c. 78, but upon this point I concur in the judgment of the Lord Chief Baron. I am of opinion that the conviction was right and ought to stand.

WATSON, B.—I am of opinion that in this case there has been a mistrial, and that this court is competent to award a *venire de novo*, and accordingly a *venire de novo* ought to be awarded. I have arrived at this conclusion after much consideration, and not without some doubt. I do not feel myself called upon, after the ample discussion that has taken place, to state my reasons any further than to say that I give my judgment on the reasons given by the Lord Chief Justice of the Queen’s Bench.

CHANNELL, B.—I entertained very considerable doubts in the course of the argument—doubts which have not altogether been removed, notwithstanding the opportunity I have had of further considering the case. I may be excused for saying so after the observations of the Lord Chief Justice of the Common Pleas, and the conflicting opinions already delivered. Having given the subject my best attention, I have come to the conclusion that there has been no mistrial. I concur in the opinion

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of my brother Erle, and in the reasons on which his opinion is founded. I am unable to distinguish this case from the Case of a Jurymen, upheld and supported, as I think it was, by the later case of *Hill v. Yates*. The facts in this case are not precisely the same as those in the Case of a Jurymen; but that case seems to me, in principle, to apply to the present. In the Case of a Jurymen the point raised was at first treated by Baron Eyre, who tried the prisoner, as unimportant; but, in consequence of the urgency of counsel, he brought it under the consideration of the twelve judges. No doubt, as observed by the Lord Chief Justice, there was no argument by counsel on both sides, nor was there any argument by counsel in the later case of *Hill v. Yates*, inasmuch as the rule for a new trial was refused. But in the last case the motion for a new trial was heard at length; it was made by a very learned counsel (afterwards an eminent judge), who brought the authorities before the court. After hearing him, Lord Ellenborough said, "if upon consideration and consultation with the other judges we find ourselves bound to grant it, we will, of our own accord, award the rule prayed for." The Case of a Jurymen was the case of a capital felony. *Hill v. Yates* was a civil action. But it is clear from the report that the court in the last case had in its mind criminal as well as civil cases; and that the objection was considered with reference to both classes of cases. I conclude that in the case of *Hill v. Yates*, in the year 1810, the twelve judges fully recognized and sanctioned the opinion of the twelve judges, their predecessors, in the Case of a Jurymen, come to twenty-seven years before. With great submission to the Lord Chief Justice, I cannot bring myself to doubt that the subject was in those cases fully considered, or that they are to be treated otherwise than as cogent authorities upon the objection now before us. Assuming that there has been an irregularity or a mistrial, it seems to me that the objection would only be ground of error. I think the 11 & 12 Vict. c. 78, does not authorize this court to award a *venire de novo*. By the statute referred to, the court is empowered with respect to questions of law reserved, to hear and finally determine the same, and thereupon to reverse, affirm, or amend any judgment, or to avoid such judgment, and order an entry to be made that the party ought not to have been convicted, or to arrest the judgment, or order judgment to be given at some other session of oyer and terminer, if no judgment shall have been previously given, or to make such other order as justice may require. It seems to me that the statute contemplates a final decision of the case without any ulterior proceedings, except such as may be necessary to give effect to the judgment of this court, and that it did not contemplate or authorize any proceedings in the shape of a *venire de novo*, or in the nature of a new trial. When a question is reserved, for instance, whether certain evidence was or was not properly received at the trial, and judgment has been given, this court, if it be of opinion that the evidence was not properly received, may reverse the judgment, and order an entry to be made on the record that the party convicted ought not to have been convicted. The judgment of this court would, I conceive, be final. Again, the court may affirm the judgment, treat it as entirely correct; and then the judgment would be final. It may also amend the judgment, as in the case of a prisoner properly found guilty, but sentenced to imprisonment for a longer term than the law authorized. Here, again, the judgment would be final. Further, the court may arrest the judgment. My brother Martin says, "If you arrest this judgment, you do so for

some defect on the record." This may show that, in one case at least, what might have been ground of error before the statute has been taken away. I agree that it may be so ; because the decision of this court is to be final, and the case of arrest of judgment is expressly provided for by the statute. The word demurrer is not used. The decision in this court, *Reg. v. Faderman*, that the court has no jurisdiction in cases of demurrer proceeded, as I understand, upon the ground that the judgment of this court in cases within the act is final ; and that to extend the jurisdiction to cases of demurrer would deprive a party of a writ of error in a case not, in terms, provided for by the statute. The provisions of the statute as to the certificate to be given are not altogether unimportant. The judgment or order is to be certified by the presiding Chief Justice or Chief Baron to the clerk of assize, who is to enter the same on the original record. A certificate of such entry by the clerk of assize is to be an authority to the sheriff or gaoler in whose custody the prisoner may be, for the due execution of the judgment, as the same shall be certified to have been affirmed or amended, and execution shall be executed according to such judgment, and for the discharge of the prisoner from imprisonment, if the judgment should be reversed, avoided, or arrested. As the act provides that the certificate may be in form, as near as may be, or to the effect mentioned in the schedule to the act, with the necessary alterations to adapt it to the case, it may not throw much light on the subject ; but the form of certificate given by the statute seems to contemplate either execution of the sentence, in case the judgment is affirmed or amended, or the discharge of the prisoner, if the judgment is reversed or arrested, and no other case. My opinion then, upon the whole, is that the statute does not apply where the judgment of this court would not finally dispose of the case, and where anything would remain to be done beyond giving effect to such final decision. I do not attach much weight to the objection as to the time at which the discovery of the alleged irregularity was made, and to the consequent objection that the question now raised was not reserved at the trial. But I would add that, as at present advised, I think it would be difficult to say that (if the argument for the prisoner is to prevail, and the prisoner had been acquitted instead of convicted) the Crown might not have raised the same question of mistrial. Upon this I give no opinion.

ByLES, J.—Joseph Henry Thorne and William Thornley are both ByLES, J. upon the panel ; Thorne is called and, by mistake, Thornley answers, is sworn, and tries the case. No prejudice appears to have been suffered by the prisoner, but it is suggested that in such a case a prejudice might possibly happen. I am of opinion that there has been no mistrial. The mistake is not a mistake of the man, but only of his name. The very man who, having been duly summoned and being duly qualified, looked upon the prisoner and was corporeally presented and shown to the prisoner for challenge, was sworn and acted as juryman. At bottom the objection is but this, that the officer of the court, the juryman being present, called and addressed him by a wrong name. Now it is an old and rational maxim of law that where the party to a transaction, or the subject of a transaction, are either of them actually and corporeally present, the calling of either by a wrong name is immaterial—*præsentia corporis tollit errorem nominis*. Lord Bacon in his *Maxims* (regulæ 25) fully explains and copiously illustrates this rule of law and good sense, and shows how it applies, not only to persons but to things.

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In this case, as soon as the prisoner omitted the challenge, and thereby in effect said I do not object to the jurymen there standing, a compact arose between the Crown and the prisoner that the individual jurymen there standing corporeally present should try the case. It matters not, therefore, that some of the accidents of that individual, such as his name, his address, his occupation, should have been mistaken. *Constat de corpore*, and that is enough, at least where the jurymen are duly qualified and summoned. Suppose the name by which the jurymen is now called not to be the name of himself or any one else, that amounts but to this, that he is called by that name improperly. Suppose the wrong name to be a name by which another or others are called, can it make any difference in principle? Suppose that a bearer of that name is to be found not only in England, but in the county, or on the panel. In all these cases there is a possibility and various degrees of probability of prejudice, or perhaps, more properly speaking, of improbability. But a mere possibility of prejudice cannot vitiate the trial, for if so a wrong addition or any other misdescription of the jurymen when called into the box would be a fatal objection to the trial. The case in the note to *Hill v. Yates* seems to me to confirm this view, and to be a solemn decision by all the judges of England, seventy-five years ago, that, notwithstanding some earlier cases, a mistake of this nature is no mistrial. If another rule is once introduced, new trials in criminal cases will come in like a flood. It is in vain to say that greater care should be used. Wise and practical regulations must contemplate and provide for the occasional oversights and inadvertences which, by the law of chances, are certain to happen among the thousands of criminal trials before all sorts of jurisdictions every year in England. Moreover, if a mistake of this nature vitiates a verdict against a prisoner it equally vitiates a verdict for him. The Crown may at any time and at any distance of time take a similar objection, and the validity of all acquittals past and future is put in jeopardy. I also entertain considerable doubt whether the statute authorizes this Court to grant a *venire de novo*.

Conviction affirmed.

Ireland.

COURT OF CRIMINAL APPEAL.

May 8, 1857.

(Before LEFROY, C. J., MOORE, and KEOGH, JJ., and
PENNEFATHER and GREENE, BB.)

REG. v. CONDY M'HUGH. (a)

*Evidence—Statement by prisoner in information—Admissibility of.**Statements made by a prisoner in an information with the view to his being examined as a witness for the Crown, are not admissible in evidence against the prisoner, for the purpose of implicating him in the offence the subject of the information.**The prisoner had made an information charging others with being engaged in an illegal conspiracy. The information was made while the prisoner was in custody. He sent for the magistrate before whom he made the information voluntarily. Neither threat nor inducement had been used to procure a statement from the prisoner, neither was there any caution given him. The information was given in evidence against the prisoner when on trial for being engaged in the illegal conspiracy for the purpose of corroborating an approver.**Held to be inadmissible per LEFROY, C. J., MOORE and KEOGH, JJ., and GREENE, B. ; dissentiente, PENNEFATHER, B.***T**HE following case was stated by Baron PENNEFATHER for the opinion of the Court of Criminal Appeal:—

The prisoners were tried before me at the last assizes of Lifford, upon an indictment framed under the 2 & 3 Vict. c. 74, s. 1.

The indictment contained six counts:—

The first count charged that there was established in Ireland a society, so constituted that the members thereof could communicate with, and were known to each other by certain secret signs and passwords, and that during the existence of the said society the prisoners did, each of them respectively, become a member of such society, and were thereby guilty of an unlawful combination and confederacy.

The second count charged that they did act in, and assist at a meeting of the said society.

The third count, that they directly and knowingly maintained

(a) Reported by P. J. M'KENNA, Esq., Barrister-at-Law.

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an intercourse with James Gallagher, he being a delegate and member of such society.

The fourth count, that they directly and knowingly maintained intercourse with John Briesland, he being a parish master and officer of such society.

The fifth count, that they directly and knowingly maintained intercourse with Niel Briesland, he being a parish master and officer of such society.

The sixth count, that they being members of such society they did directly and knowingly maintain intercourse together and to and with each other, as members of such society.

The prisoners were convicted, and I sentenced each of them to twenty months imprisonment with hard labour.

The evidence for the prosecution, consisted of first Patrick M'Glynn, an accomplice.—He proved the nature of the society generally and its existence in the county of Donegal. He proved each of the prisoners to have belonged to the society, and to have done some act to connect them with the confederacy. To corroborate Patrick M'Glynn, with respect to one of the prisoners named Condry M'Hugh, the Crown proposed to give in evidence the informations of Condry M'Hugh himself, taken before Mr. Cruise, the resident magistrate, and called Mr. Cruise, who gave the following evidence:—

Daniel John Cruise, R.M., examined.—Knows the prisoner Condry M'Hugh, he came before witness on the 9th of June, 1856, and made a voluntary communication; he sent for witness, he (M'Hugh) was then in Glenties bridewell; he asked witness what was the charge against him. Witness told him. M'Hugh said nothing. Witness then went away. M'Hugh sent again for witness in about an hour afterwards, and made his information (produced). Witness made no threat or held out no inducement to the prisoner; did not caution him against criminating himself; he was sworn; he is a marksman; witness was present when he put his mark.

To the court.—Did not inform M'Hugh that his information would be used against him. Witness thought that the prisoner would be admitted as a Crown witness, and the prisoner might have been under that impression also.

Examination continued.—Witness refused to admit the prisoner to bail. M'Hugh was in as a Crown witness. Witness was told in Dublin he might admit them to bail. M'Glynn swore his information again in presence of the prisoners, and witness told them they might ask him any questions. M'Hugh refused to swear, and said he would go no further; he said he would not support his former informations, or appear as a witness.

Cross-examined.—None of the prisoners were present when M'Hugh swore his informations. Witness asked M'Hugh would he support the informations, he said he would not; he said he would never swear again. Witness had no communication with M'Hugh afterwards.

Counsel for the prisoner then objected to the information being received in evidence, contending,

1st, That it was inadmissible as a confession, because the usual caution was not given, and that it was made under an inducement; 2nd, That its having been taken on oath rendered it inadmissible as a confession.

I received the evidence subject to the objections, and I directed Mr. Cruise to read the information, omitting the names of any of the prisoners which might be mentioned in it, except that of M'Hugh himself.

At the conclusion of the case, counsel for the prisoner further objected that the Crown had not asked M'Hugh at the trial to support his information before they gave it in evidence. The question for the court is, whether, under the circumstances, the information was properly received in evidence against M'Hugh.

J. P. Hamilton (with whom *Dowse*) for the prisoner, after stating the facts.—The conviction in this case is bad, as this information should not have been received in evidence against the prisoner. This was a statement made by the party on oath while a prisoner, and under examination respecting a criminal charge. It cannot be treated as a statement of the prisoner made after hearing the evidence against him, and after the necessary statutory caution, for it appears affirmatively by the judge's notes that this caution was not given. Taking it most favourably for the Crown, it is a confession made under duress, with a view and under the hope of being admitted as an approver: (2 Russ. Crim. Law, 830.) It is sought to treat M'Hugh as a witness so far as to deprive him of the safeguard provided for a prisoner by the statute, at the same time that he is placed in the position of a prisoner, so as to place before his mind all possible inducements to save himself from the fate of a prisoner, by giving evidence against his fellow prisoners. In this respect the present case differs from those in which a party, not a prisoner, having come voluntarily forward and been examined as a witness, has been afterwards put on his trial, and his own sworn admission used against him. These cases went on the ground that the witness, being a free man at the time his evidence was voluntarily given, was free from the disturbing influences of hope or fear, which must influence a person in custody. The course here pursued was an application of the French system, and quite opposed to the spirit of our criminal and statute law. (Counsel cited and commented on *Reg. v. Davis*, 6 Car. & P. 177; *R. v. Wheeley*, 8 Car. & P. 250; *Reg. v. Owens*, 9 Car. & P. 83, and 238; 1 Phillips's Ev. 422; 1 Taylor, 722.)

Major, Q.C. (with whom *Robert Johnstone*).—At common law the rule is, that anything a party says or writes is evidence against him, subject in criminal cases to the exception that the statement should be voluntary: (2 Russ. Crim. Law, 857; 2 Leach C. C. 552.) This case comes under the rule which renders the evidence admissible; because, although the prisoner was in custody, he thought proper to make the statement of his own motion. There are two

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questions here; first, was this statement by the prisoner voluntary; secondly, does the fact of its having been made on oath invalidate it. The case stated shows that the prisoner's statement was voluntary. In *Scott's case* (7 Cox Crim. Cas. 169), Lord Campbell says that "this only means that it shall not be induced by improper threats or promises, because under such circumstances the party may have been influenced to say what is not true, and the supposed confession cannot be safely acted on." The result of the authorities is thus stated in Taylor's Evidence, 724: "On the whole it seems clear that if a prisoner, on being examined as a witness, has consented to answer questions to which he might have demurred as tending to criminate himself, and which, therefore, he was not bound to answer, his statement will be deemed voluntary, and as such may be subsequently used against him for all purposes, unless he be protected by the special language of some statute." It has been urged that the fact of a statement being on oath necessarily involves compulsion of some kind, and renders it inadmissible. That is a mistake. If a man comes into court with a written statement in his hand, and asks to be sworn to it, can it be said that it is not a voluntary statement? If that test be applied, it will be seen that a statement, being on oath, does not necessarily involve its being involuntary. Then, with regard to the fact that the prisoner was in custody, and the inference that has been drawn that, therefore, the information was not voluntary, in *Reg. v. Glennor* (1 Ir. Cir. Rep. 359), statements made by prisoners in custody were admitted, because there was nothing appearing in the case to show that there was any inducement held out, or threat used towards the prisoner. (He cited and commented on *Moore's case*, 2 Lewin C. C. 37; *Moreton's case*, 1 Lewin; *Wheater's case*, 2 Moo. C. C. 45; *Reg. v. Merceron*, 2 Stark. N. P. Cases, 366; *Reg. v. Scott*, 7 Cox Crim. Cas. 164; *Reg. v. Crossley*, ibidem, 68; *Reg. v. Bolding*, 2 Den. C. C. 430; and *Coggett's case*, 25 L. J. 93, M. C.)

Dowse in reply.—The oath taken by the prisoner is a material element in the consideration whether the confession, if it can be so called, is voluntary within the rule referred to. *Hall's case* (2 Leach, 559), shows that a confession made under the hope of the party making it being admitted king's evidence is not admissible. The same rule is laid down in *Reg. v. Boswell*: (1 Car. & M. 584.) In that case a statement made by Boswell was given, and it appeared during the progress of the trial that the prisoner on the night before he made the statement, said to a constable that he saw no reason why he should suffer for the crime of another, and that as the Government had offered a free pardon to any one concerned who had not struck the blow, he would tell all he knew about the matter. The judge, when his evidence was given, struck out of his notes the statements made by the prisoner, which had been previously received in evidence. It has been said in the course of this case that the court cannot inquire into a man's motives for making a confession or statement. This, as a general rule, is not

disputed; but if a prisoner, by telling another his object in making a confession, can disclose what is passing in his mind so as to shut out his statements at such time, another prisoner can equally disclose such an object, if not by words by such an act, as the prisoner's here, which is only referable to one motive, his expectation of being received as a Crown witness. In *Rex v. Brutley* (6 Car. & P. 148), a statement was rejected because it purported to be taken on oath. The same rule is acted on in *Reg. v. Pickersley* (9 Car. & P. 194) and *Rex v. Wheatley*: (8 Car. & P. 250.) In *Rex v. Davis* (6 Car. & P. 177), it was held that what the prisoner said before the magistrate, as a witness, could not be received in evidence against her when she was on her trial for the same offence. In *Rex v. Lewis* (6 Car. & P. 161), Baron Gurney states the distinction which explains the apparent difference between many of the cases. In that case several persons, one of whom was the prisoner, were summoned before a magistrate, touching the poisoning of one Elizabeth Davis. No person was then specifically charged with the offence. The prisoner was sworn, and made a statement, and at the conclusion of the examination was committed for trial. The judge ruled that the statement was not admissible, and said, "This case is quite distinguishable from the one you have cited: (*Rex v. Tubby*, 5 Car. & P. 530.) Under the circumstances of that case, I should have been disposed to agree with my brother Vaughan. I remember in the case of *Rex v. Walker*, tried in the year 1806, which was a case of forging a will, I gave in evidence an affidavit made by one of the prisoners in the suit in Doctors Commons, and the prisoner was convicted and executed. But this being a deposition made by the prisoner at the same time as all the other depositions on which she was committed, and on the very same day on which she was committed, I think it is not receivable. I do not think this examination was perfectly voluntary. The cases cited for the prosecution when bankruptcy examinations have been received in evidence are distinguishable from such a case as this for two reasons:—1st, In these bankruptcy cases the witness is compelled by law to give the evidence, and when given it is evidence for all purposes. 2nd, The statement on oath has been made in another matter, and when the prisoner was not charged with any offence. Notwithstanding Mr. Taylor's view of this question, principle should exclude this evidence."

Cur. adv. vult.

June 12, 1857.

LEFROY, C. J., after stating the facts.—In an information a witness never states anything with the view of its being used against him as here it is sought to be used. When under an examination, a prisoner after being cautioned, will state everything which he thinks will make for himself, and it is a most important thing for the prisoner that he should be called to say anything what he can on his own behalf, because it gives a man a fair opportunity if he have a real substantial *alibi*, or any other fact

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which would negative his guilt to make it available, and if he afterwards substantiates the account, there is an air of truthfulness given to it, which it would not otherwise possess. As Lord Hale says, it is not merely optional with, but it is the duty of the magistrate to give a prisoner the opportunity of stating his defence, and of putting any questions to the witnesses that he may think useful to him. On the other hand, here you would seek to begin by taking an information from a man as a witness, bind him over to give evidence, and then offer this information as evidence against him. Under the circumstances of this case, and in absence of all authority, I do not think we should allow this information to be used against the prisoner, thus depriving him of the benefit he should have had of making a statement favourable to himself, and explaining the evidence if it were originally contemplated to use this information against him as a confession, a statement by a prisoner. We have examined closely the authorities, and although there may be observations of writers to the effect that judges have gone too far in shutting out such evidence, we have found nothing to force on us the admission of an information made under the circumstances of this case.

GREENE, B.—I felt much pressed by that case in Carrington and Payne, which seemed a direct authority, and the passage in Taylor on Evidence, bearing on this question. I have thought it right to look into the cases referred to in Taylor, and find that some of them were prior to, and therefore do not overrule it. My brother Pennefather, I believe, agrees with me.(b)

KEOGH, J., concurred.

(b) Baron Greene caused it to be communicated to the reporter that he was mistaken in supposing that Baron Pennefather agreed with him. Baron Pennefather adhered to his original opinion.—P. J. M.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

December 5, 1857.

Present: The Right Hon. Lord WENSLEYDALE, T. P. LEIGH,
Sir W. MAULE, Sir E. RYAN, and Sir L. PEEL.

NGA HOONG v. THE QUEEN. (a)

Criminal jurisdiction — Murder partly within jurisdiction — Supreme Court of Calcutta—Limits of India Company's charter—9 Geo. 4, c. 74, s. 56; 9 Geo. 4, c. 31, s. 8.

The stat. 9 Geo. 4, c. 74, s. 56 (applying to India the English stat. 9 Geo. 4, c. 31, s. 8, as to persons dying within the jurisdiction of felonious wounds given without the jurisdiction, and vice versâ) does not extend to persons who were not otherwise amenable to the criminal jurisdiction of the court. And the expression "within the limits of the charter of the said united company" means within the "limits of the trading charter."

THIS was an appeal from a judgment of the Supreme Court of Calcutta.

The appeal arose out of the following circumstances:—In or about the month of June, 1856, the appellants, natives of a part of Burmah, under the government of the East India Company, were apprehended by order of Mr. Briggs, the Deputy Commissioner of Tavoy, and one of Her Majesty's Justices of the Peace, on the charge of murdering a boat's crew of natives of Tavoy, in certain uninhabited islands, called the Coco Islands, in the Bay of Bengal; and were subsequently sent by him to Calcutta, to be there tried in the Supreme Court.

Under various statutes, the criminal jurisdiction of the Supreme Court has always practically been treated as applying only to crimes committed within the presidency of Calcutta and its factories, and to crimes committed by the British subjects of the Crown within the mercantile limits of the East India Company's charter.

The Coco Islands are not within the town of Calcutta, or its factories, and the appellants are not British, but merely subjects of the Crown.

By the 56th section of the act 9 Geo. 4, c. 74, it was provided "that where any person being feloniously stricken, poisoned, or otherwise hurt, at any place whatsoever, either upon the land or

(a) Reported by JAMES PATERSON, Esq., Barrister-at-Law.

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at sea, within the limits of the charter of the said united company, shall die of such stroke, poisoning, or hurt, at any place without those limits; or, being feloniously stricken, poisoned, or otherwise hurt, at any place whatsoever, either upon land or at sea, shall die of such stroke, poisoning or hurt, within the limits aforesaid, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory before or after the fact to murder or manslaughter, may be dealt with, inquired of, tried, determined and punished by any of His Majesty's courts of justice within the British territories under the government of the said united company, in the same manner in all respects as if such offence had been wholly committed within the jurisdiction of the court within the jurisdiction of which such offender shall be apprehended or be in custody."

The object of this act, as appearing by the preamble thereto, was to extend to India, and to those who were subject to the criminal law of England, divers alterations which had then lately been made in the criminal law of England by authority of Parliament.

Shortly before the passing of this act, an act of Parliament was passed (9 Geo. 4, c. 31), the 8th section of which provided "that where any person being feloniously poisoned, or otherwise hurt upon the sea, or at any place out of England, shall die of such stroke, poisoning, or hurt in England, or being feloniously stricken, poisoned, or otherwise hurt at any place in England, shall die of such stroke, poisoning or hurt, upon the sea or at any place out of England, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory before the fact to murder, or after the fact to murder or manslaughter, may be dealt with, inquired of, tried, determined and punished in the county or place in England in which such death-stroke, poisoning, or hurt shall happen, in the same manner in all respects as if such offence had been wholly committed in that county or place."

The appellants submitted that sect. 56 of the act 9 Geo. 4, c. 74, was framed as and was intended to be an adoption of sect. 8 of the act 9 Geo. 4, c. 31, so as to make similar alterations in the English criminal law when administered in India, and was not intended to render any person subject to the criminal jurisdiction of the Supreme Court who was not previously subject thereto, and was not intended to give the Supreme Court a general jurisdiction over all natives in cases of murder and manslaughter; and that this was the just result to be collected from a consideration of the preamble and the various provisions of the act.

The appellants were found guilty under the indictment preferred against them, found on the stat. 9 Geo. 4, c. 74, s. 56. The question of jurisdiction having been reserved, and argued before the Supreme Court, two judges, viz., the Chief Justice and Buller, J., were in favour of sustaining the jurisdiction: while Jackson, J., dissented. Execution of the sentence having been respited, the prisoners now appealed to Her Majesty in Council.

Wigram, Q. C., Forsyth, Q. C. and Melville, for the appellants, contended that the stat. 9 Geo. 4, c. 74, did not extend the jurisdiction of the court over persons who were not previously subject to its jurisdiction: (*Doss v. The King*, 1 Moore Ind. Ap. C. 67; Russell on Crimes, 68, 69; *Vallance v. Liddell*, 9 A. & E. 932; *Lyde v. Bernard*, 1 M. & W. 101.)

The Solicitor-General (*Keating*) and *Welsby*, for the Crown, contended that the word "person" being general, and there being no limitation, the statute must be held to apply to all.

Wigram replied.

The judgment of the court was delivered by

LORD WENSLEYDALE.—Their Lordships in this case have had an opportunity of consulting the arguments in the Court of Calcutta, which are ably and perspicuously stated by the Chief Justice and Buller, J., on one side, and Jackson, J., on the other. They have heard as well every argument which could be advanced either in favour of the conviction or against it at the bar; and having formed their conclusion, and entertaining no doubt upon the question, they think it would be improper to create any further delay for the purpose of considering this case. They are quite satisfied that the judgment cannot be supported, and that the conviction was wrong. The question in this case depends entirely upon the construction of the 9 Geo. 4, c. 74, and of the 56th section of that act, taken in conjunction with the preamble. Now there is nothing more clear than that, with respect to the criminal law, the construction is always to be strict; and putting a strict construction upon the 56th section of this act, we have no doubt that it was not meant to apply to a case of this kind, but that, in the first place, it extends only to persons who were otherwise amenable to the criminal jurisdiction of the court at Calcutta, who are the persons described in the first section, and that by the language of the section in question, it applies only to cases in which the felony or crime has been committed, by persons who could commit that crime, partly within the jurisdiction and partly without. The object of the statute, as appears by the recital, was for the purpose of applying and extending to the British territories in India the same provisions as had been recently made for England with respect to offences committed in two different places, or partially committed in one place and accomplished in another, which provisions had been the subject of a recent enactment in the 9 Geo. 4, c. 31. The preamble describes that to have been the object of the statute; and there can be no doubt that we must consider the preamble as a key to the construction of the statute, though it would not, of course, control every provision, for we very often find that the subsequent provisions of a statute extend beyond the limits of the preamble. The statute goes on to say that the object being that the "alterations should be extended to the British territories under the government of the United Company of Merchants of England trading to the East Indies," it is therefore enacted that the act "shall extend to all persons and

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all places, as well on land as on the high seas, over whom or which the criminal jurisdiction of any of his Majesty's courts of justice erected or to be erected within the British territories under the government of the United Company does or shall hereafter extend." Now that clause clearly shows that the object of the statute was that it should apply to such persons. The Solicitor-General says that the word "extend" is not to be construed to confine it to such persons, and that it is not to limit the jurisdiction. But the word "extend" is to be explained by the preamble, which states the object of the statute to be to extend the recent enactments of the act which is in force to the East Indies, and the word "extend" is to be read as if it were "apply." Then we must consider whether the 56th section applies merely to those persons, or whether, as the Chief Justice and Mr. Justice Buller have stated, it extends beyond the preamble, and applies to an offence completely committed within the limits of the company's trading charter, but not within the limits of Calcutta. Now, reading that clause, we think there is really no difficulty in saying that the sole object of it was that it should apply to offences partially committed in one district and completed in another. The word "feloniously," at the commencement of that clause, seems to show that it was meant that at the time when the person gave the original stroke he was a person capable of committing felony. One question raised before us by the learned counsel for the appellants, is as to the meaning of the term "within the limits of the charter of the said United Company?" On that point I believe their Lordships have not the slightest difficulty. Those words are to be construed in the same way as they are used in the statute of 26 Geo. 3, to which this statute forms an addition. They are to be construed to mean within the limits of the trading charter of the company. So far, therefore, as regards the place of committing the offence, this was an offence committed within those limits, and the court had in that respect jurisdiction. But the words of the section do not apply to entire offences, begun and completed within the jurisdiction, but to those partly committed within and partly without, which are put on the same footing as if they had been "wholly committed within the jurisdiction." It is perfectly clear that the term "wholly" shows the intention of the Legislature to be, that the section should apply only to that description of the case; and it cannot have the sense of "actually committed" put upon it, as is contended on the part of the Crown, without doing violence to the words. Therefore, it appears to us, proceeding upon the ordinary rules of the construction of penal enactments, that the object of this section was merely to apply the improvement of law which had lately taken place in England to the case of persons amenable to the courts of justice at Calcutta, beginning to commit offences in one place which were afterwards completed in another; that it does not apply at all to a case of this kind, where the persons committing the offence were not amenable to the court of Calcutta, and where the whole offence

which has been committed was within one jurisdiction. The court are confirmed in their opinion as to the meaning of the statute, with respect to the persons to whom it is applicable, by the last clause of the 127th section. It is introduced at the end of this statute obviously with the purpose of showing what class of persons were liable to the provisions of the statute; and it extends the liability of persons to the jurisdiction of the courts beyond what it has been before. That section enacts "that all persons, whether British subjects or others, employed by, or in the service of, his Majesty, shall be held amenable to the criminal jurisdiction of his Majesty's courts of justice, erected or to be erected within the British territories, under the government of the said India Company, in the same manner as persons employed by, or in the service of, the said united company, are now by law subject and amenable to the said jurisdiction." Before that statute, British subjects properly designated as British subjects, that is, British-born subjects and persons in the service of the East India Company, were liable to the jurisdiction of the court of Calcutta; persons not in the employment of the East India Company, but in the employment of his Majesty, were not so liable. This statute extends the liability to those who are servants of the Crown; and that provision, finding its place in this act of Parliament, raises, in their Lordships' opinion, a strong inference that the statute was meant to apply to no other persons than those who were liable to the jurisdiction of the court of Calcutta, to which the last clause makes a considerable addition. Therefore, looking at this act of Parliament altogether, their Lordships have not any doubt what the object of that statute was; it was only to apply the law which had been lately enacted in England, as to an offence partly committed in one part and completed in another, to the East Indies, and not to make a new enactment rendering persons liable to punishment for a complete offence, who would not have been liable before. If the result of our decision should be that these appellants are to escape from justice, we shall regret it; but it is a matter which cannot influence our judgment. If the Mofussil Court has no jurisdiction now, by virtue of the East India Company's regulations, to dispose of this case, they must escape justice; but we are not in any way to alter or construe differently the rules of the criminal law, in consequence of the supposed justice of a particular case. The rule is, that the law is to be strictly construed; and so construing it, or even without that strictness, the construction of this 56th section appears to us to require us to pronounce in favour of the appellants.

Reversed.

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COURT OF CRIMINAL APPEAL.

November 30, 1857.(Before COCKBURN, C.J., ERLE, WILLIAMS, CROMPTON, JJ.,
and CHANNELL, B.)

REG. v. CLOSS. (a)

*Forgery at Common Law—False token—Obtaining money by
cheating—Indictment.**Forgery at common law must be of some writing or document, and, therefore, the putting the name of a painter upon the copy of one of his pictures, in order that it may be passed off as the original, is not a forgery at common law. But such passing off of the copy of the picture as the original, and obtaining money by means of such false representation, is a cheat at common law.**The indictment must, however, allege, specifically, that it was by means of the false name being upon the picture that the defendant was enabled to pass off the picture to the prosecutor.***T**HE following case was reserved from the Central Criminal Court by the common serjeant of the city of London.

The prisoner was tried at the last October sessions of the Central Criminal Court, on an indictment, the first count of which charged him with obtaining money by false pretences, and upon this he was acquitted. He was, however, found guilty upon the remaining counts of the indictment, which were as follows: And the jurors aforesaid upon their oath aforesaid do further present, that before the time of the commission of the offence in this count hereinafter stated and charged, one John Linnell of Redhill, in the county of Surrey, an artist in painting of great celebrity, and well known as such to the liege subjects of our Lady the Queen, had painted a certain large and valuable picture, whereon he had painted his name to denote that the said picture had been painted by him the said John Linnell. And the jurors aforesaid upon their oath aforesaid do further present, that the said Thomas Closs, being a dealer in pictures, well knowing the premises aforesaid, and being a person of fraudulent mind and disposition, and devising, contriving, and intending to cheat and defraud on the 24th day of July, in the year of our Lord, 1857, and on divers other days between that day and the time of taking this inquisition, knowingly, wil-

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

fully, falsely, fraudulently, and deceitfully, and within the jurisdiction aforesaid, did keep in a certain shop wherein he the said T. Closs did carry on his said trade of a dealer in pictures, a certain painted copy of the said picture, on which said painted copy was then and there unlawfully painted and forged the name of the said John Linnell, with intent thereby and by means thereof to denote that the said copy of the said picture was an original picture painted by the said J. Linnell. And the jurors aforesaid upon their oath aforesaid do further present, that the said T. Closs well knowing the said picture so in his possession to be such copy of the said picture so painted by the said J. Linnell as aforesaid, and well knowing the name of the said J. Linnell so painted upon the said copy to be forged, did wilfully, falsely, fraudulently, and deceitfully, and within the jurisdiction aforesaid, offer and expose for sale the said copy with the said forged name so upon it, and did offer, utter, dispose of, sell and put off to Henry Fitzpatrick the said painted copy as and for the genuine picture of the said J. Linnell, with intent to cheat and defraud the said H. Fitzpatrick of his moneys and valuable securities; and that the said T. Closs did so fraudulently cheat and defraud the said H. Fitzpatrick of, and did so fraudulently obtain from the said H. Fitzpatrick valuable securities, to wit, a cheque and three bills of exchange, with intent to defraud.

And the jurors aforesaid upon their oath aforesaid do further present, that before the time of the commission of the offence in this count hereinafter stated and charged, one J. Linnell of Redhill, in the county of Surrey, an artist in painting of great celebrity, and well known as such to the liege subjects of our Lady the Queen, had painted a certain large and valuable picture, whereon he had painted his name to denote that the said picture had been painted by the said J. Linnell; and the jurors aforesaid upon their oath aforesaid do further present, that the said T. Closs being a dealer in pictures, and being a person of fraudulent mind and disposition, and devising, contriving, and intending to cheat and defraud on the 24th day of July, in the year of our Lord, 1857, and within the jurisdiction aforesaid, unlawfully, wilfully, and wickedly did procure and have in his possession for the purposes of sale a certain painted copy of the said picture, on which said painted copy of the said picture was then and there unlawfully painted and forged the name of the said J. Linnell. And the jurors aforesaid upon their oath aforesaid do further present, that the said T. Closs, well knowing the name of the said J. Linnell so painted upon the said copy to be forged, did then and there, and within the jurisdiction aforesaid unlawfully, deceitfully, wickedly, and fraudulently offer, sell, dispose of, utter, and put off to the said H. Fitzpatrick the said painted copy of the said original painted picture with the name of the said J. Linnell so painted and forged thereon as aforesaid, and the said forged name of the said J. Linnell for a certain large sum of money, to wit, the sum of 130*l.*, to the great damage and deception

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of the said H. Fitzpatrick, to the evil example of all others in the like case offending, and against the peace of our Lady the Queen, her crown and dignity.

It was objected by the prisoner's counsel in arrest of judgment that these counts disclosed no indictable offence, and the judgment was respited until the next session, that the opinion of this court be taken, whether or not the second and third counts or either of them sufficiently showed an indictable offence at common law. The prisoner remained in custody.

M'Intyre for the prisoner.—The second count is bad, for it does not allege a cheat as against the public, but merely against a private individual: (2 Russ. 280.) Again, the count is bad for not alleging that it was by means of the said cheat that the money was obtained. It alleges possession of the picture, the offering with intent to cheat, and the obtaining the money, but the means by which the money was obtained are not alleged. It is quite consistent with that count that the money was not obtained by reason of the name of Linnell being then upon the picture. As to the third count. The crime of forgery is defined in Russ. 318, to be "the fraudulent making or altering a writing to the prejudice of another man's right," and it clearly does not include this case. Forgery must be of the whole or of some material part of a written instrument. What was done here was no more than saying that the picture was painted by Linnell. But there cannot be a forgery of a picture. It may be imitated, but it cannot be forged. The name of "Linnell" is no more than a tree or a house painted upon it. It is part of the whole thing imitated, but it is not a forgery. Suppose a man were to put the name of Joseph Manton upon a gun, and pass it off as made by that maker, surely that would not be a forgery of the gun, although it might be a false pretence knowingly to obtain money by so representing it. The name of a painter on a picture is no more than a trade mark on goods, and it has never yet been held that copying trade marks is forgery. The only subject of forgery here would be the signature, but there is no averment that there was any uttering of the forged signature as distinct from the picture, even if that would be an offence. Suppose in the case of the gun that it was really made by Manton, but that his name was put on it by some other person, could the instrument be said to be forged, when in truth it was genuine, and nothing about it was spurious except the trade mark?

Metcalfe for the prosecution.—It is not necessary to show that the cheat was one which affected the public generally (*Alley's case*, Tremain's P.C. 109; *Re Worrell*, ib. 106), any fraudulent device calculated to deceive a person of ordinary understanding is sufficient. A bare lie may not be indictable, but if to that is added a false token, then there is a cheat at common law. The third count is a good count for forgery. It shows that the signature of Linnell was a forgery, and that the prisoner knowingly put off the picture with the signature upon it. It is dis-

tinctly averred, therefore, that the prisoner uttered the signature if he uttered the picture with the signature attached. Suppose he had uttered a separate document, purporting to be a certificate of Linnell, signed by him, that the picture was of his painting, that would surely be a forgery, and the fact that such certificate is on the painting itself will not make it less a forgery: (*R. v. Toshack*, 1 Dear. C. C. 285; 23 L. J. 51, M. C.; *R. v. Sharman*, 6 Cox Crim. Cas. 312.)

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COCKBURN, C. J.—If you once go beyond a writing where are you to stop? Could there be a forgery of sculpture? There is here no allegation of a distinct uttering of the signature.

Metcalf.—There is a sufficient averment to sustain the indictment after verdict.

WILLIAMS, J.—It is quite consistent with the facts here that the defendant sold the picture without calling attention to the signature.

M'Intyre replied.

Cur. adv. vult.

JUDGMENT.

COCKBURN, C. J., now delivered judgment as follows:—The prisoner was indicted on a charge of having sold to one Fitzpatrick a picture as and for an original picture painted by Linnell, when in truth it was only a copy, and that he had passed it off by means of having the name "J. Linnell" painted in the corner of the picture in imitation of the original, which bore such signature. There were three counts in the indictment. The first was for obtaining money by false pretences, on which the prisoner was acquitted. The second was for a cheat at common law; and the third for a cheat by means of forgery at common law. As to the third count, we are all of opinion that that was no forgery. A forgery must be of some document or writing; but the name of Linnell in this case can only be regarded as an arbitrary mark put upon the picture by the painter to enable him to recognize his own work. As to the second count, we have carefully looked into the authorities, and we think that if a person in the way of his trade or business put, or suffer to be put, a false mark or token upon any article so as to pass off as genuine that which is spurious, and the article is sold, and money obtained by means of that false mark or token, that is a cheat at common law. As for instance in the example put of a man selling a gun with the mark of a particular manufacturer upon it, he intending to have it believed that it was the work of such manufacturer, but well knowing it was not so, that would be a cheat, and the seller would be liable to punishment. But then the indictment must be framed to meet such a case, and we are of opinion that this count is not so framed; for although it sets out the false token, it does not sufficiently show that it was by the means of that false token that the prisoner was enabled to pass off the picture upon the prosecutor, and to obtain his money. We think, therefore, that this conviction cannot be sustained.

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CROMPTON, J.—With respect to cheats at common law the modern authorities have to some extent qualified the older ones, and left the law upon the subject in some doubt. In this case, however, I think no such difficulty arises, and I therefore agree with the rest of the court that the conviction must be quashed.

Conviction quashed.

Metcalf for the prosecution.

M'Intyre for the prisoner.

COURT OF CRIMINAL APPEAL.

April 24, 1858.

(Before POLLOCK, C.B., WIGHTMAN, WILLES, JJ.,
BRAMWELL, B., and BYLES, J.)

REG. v. JOHN JONES AND HENRY JONES. (a)

*Larceny—Metal fixed in land—Sundial in a churchyard—7 & 8 Geo. 4,
c. 29, s. 44.*

A copper sundial fixed on the top of a wooden post standing in a churchyard, is metal fixed in land in a place dedicated to public use, and the subject of larceny, within the 7 & 8 Geo. 4, c. 29, s. 44.

THE following case was reserved and stated by Bramwell, B.:—

The prisoners were convicted before me at the last assizes at Cardigan, and sentenced each to one month's imprisonment with hard labour, and five years' reformatory, on an indictment under the 7 & 8 Geo. 4, c. 29, s. 44, which charged that they stole, and that they ripped with intent to steal, certain metal fixed in land. The property was laid in the perpetual curate of the parish and in the churchwardens and overseers, naming them.

It was proved that in the churchyard of the parish in question, stood a wooden post; fixed on the top of this post was a sundial made of copper. This the prisoners had taken off the post, probably by removing the screws with which it was fastened.

Entertaining doubts whether the case was within the statute, I reserved the case for the Court of Criminal Appeal.

G. BRAMWELL.

Bowen, for the Crown.—The 7 & 8 Geo. 4, c. 29, s. 44, enacts, "that if any person shall steal, or rip, cut, or break with intent to

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

steal, any glass or woodwork belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture whether made of metal or other material, respectively fixed in or to any building whatsoever, or anything made of metal fixed in any land being private property, or for a fence to any dwelling-house, garden, area, or in any square, street, or other place dedicated to public use or ornament, every such offender shall be guilty of felony, and being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny, and in case of any such thing fixed in any square, street, or other like place, it shall not be necessary to allege the same to be the property of any person." A churchyard is a place dedicated to public use within the meaning of this section, and, therefore, stealing fixtures out of a churchyard is punishable under this section. The circumstances of this case are not distinguishable from those in the following cases reported in 2 Russ. on Crimes, 65:—"Upon an indictment for receiving stolen brass, which alleged that one E. Smith had been convicted of stealing the brass fixed in the churchyard at M., that being 'a place dedicated to public use,' evidence was given that the brass was fixed into many of the tombstones in the churchyard; and it was objected that the words 'other place dedicated to public use or ornament,' meant places *ejusdem generis* with square and street. Bosanquet, J.—This statute, which is rather particularly worded, makes it an offence to steal brass fixed in any square, street, or other place dedicated to public use or ornament; and I think that a churchyard is a place of that kind within the meaning of this act. If the prisoner is convicted, I do not say that I will reserve the point, but I will take it into further consideration. The prisoner was acquitted: (*Rex v. Blick*, 4 C. & P. 377.) In a previous case where the prisoners were indicted for receiving brass knowing it to have been stolen, and it was proved that the brass had been a plate affixed by rivets to a tombstone in a churchyard, and that the tomb was formed of one flat stone at the top, which was supported by others underneath, Vaughan, B., at first said, 'The words of the act are very general, and I think extend to every kind of building; and I think that this kind of tomb may be said to be a building.' But on being referred to *Rex v. Reece*, 2 Russ. on Crimes, 65, he expressed doubts whether the tomb could be considered as a building within the meaning of the act. It was then urged that the case came either within the words 'anything made of metal fixed in any land being private property,' or a 'place dedicated to public use or ornament;' and Vaughan, B., inclined to think the latter words sufficiently general to include this case, and the prisoners being found guilty, he postponed the case to consult Park, J. A., J.; and the prisoners were afterwards sentenced without any notice being taken of the point: (*Rex v. John and Daniel Jones*, MS.)" It is submitted, therefore, that the conviction is good.

No counsel appeared for the prisoners.

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BRAMWELL, B.—My difficulty is not as to a churchyard being a place dedicated to public use, but as to whether such a place is within the act. The statute first speaks of metal fixed to a building, then of metal fixed in land, being private property; then of metal, part of a fence, to any dwelling-house, garden, area; then of metal, part of a fence, in any square, street, or other place dedicated to public use or ornament. This shows, to my mind, that by “other place dedicated to public use or ornament,” was meant place *ejusdem generis* as square and street, and I doubt if a churchyard is such a place. Again, is metal fixed on a post let into the ground, metal fixed in land within the meaning of this section?

POLLOCK, C. B.—I believe all the rest of us are agreed that this was metal fixed in land, in a place dedicated to public use, within the contemplation of this section.

BRAMWELL, B.—I own I cannot see that this case is within the meaning of the act. This was not metal fixed in land, being private property, nor was it part of a fence of any dwelling-house, or of any square or street. I doubt if a churchyard is a public place within that section, and whether a piece of metal fixed on the top of a piece of wood fixed in the ground, is metal fixed in land.

WILLES, J.—If my brother Bramwell were right, it would be an offence to steal the iron railing of Hanover Square, but none to steal the bronze statue of William Pitt, erected therein.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

April 24, 1858.(Before POLLOCK, C.B., WIGHTMAN, WILLES, JJ.,
BRAMWELL, B., and BYLES, J.)

REG. v. FRANCIS GRIFFITHS. (a)

Forgery—Receipt—Signature of agent—Fraudulent insertion of larger sum than paid.

B. was employed to collect and deliver parcels by a railway company, and was paid a sum for collecting, and also a sum for delivering each parcel. The station-master, whose duty it was to pay B., falsely told B. that the company had determined to discontinue paying for the delivery of the parcels, and to pay only for collecting. The station-master, in his accounts with the company, continued to charge them with payments to B. for the delivery of parcels, and as vouchers for such payments wrote on the side appropriated to the collection of parcels, in the printed forms for the accounts supplied by the company, "Received for B.," which a servant of B.'s, to whom he paid the moneys due for collecting the parcels, signed. Afterwards the station-master secretly put a receipt stamp under the signature, and wrote across it the aggregate amount both for collecting and delivering the parcels :

Held to be a forgery.

THE following case was reserved and stated by Bramwell, B. :—

The prisoner was convicted before me, at the last Carmarthenshire assizes, of forgery, and sentenced to one year's imprisonment, with hard labour. He was station-master at the Narbeth-road Station of the South Wales Railway. One Bowers collected and distributed parcels that were sent from and arrived at the station. For each service he was entitled to payment, which the prisoner ought to have made to him. Printed forms were furnished the prisoner, one of which accompanied this case. These printed forms he had to fill up and return. He told Bowers that the company had determined not to pay him anything for delivery, but only for collecting; Bowers assented. This statement of the

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

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The conviction is right, unless I ought to have directed an acquittal, as to which I have to request the opinion of the Court of Criminal Appeal.

G. BRAMWELL.

"South Wales Railway, an account of parcels, inwards and outwards. Week ending—185 ."

The following is a copy of the material part of the printed form falsified by the prisoner:

[illegible]

"This account is to be attached to the weekly abstract (No. —), and is to be accompanied by receipts for the amounts paid for collecting and delivery, either on this or a separate paper."

**No counsel appeared for the prisoner.
By the COURT.**

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

April 24, 1858.

(Before POLLOCK, C.B., WIGHTMAN, WILLES, J.J.,
BRAMWELL, B., and BYLES, J.)

REG. v. MOAH. (a)

Forgery—Testimonial of character—Letter.

The forgery of a letter of recommendation of character, with intent fraudulently to obtain a situation as a police-constable, is an offence at common law.

THE following case was reserved and stated by Bramwell, B.:—

The prisoner was convicted before me at the last Chester assizes.

The first four counts of the indictment charged the forging and uttering by the prisoner, of a letter, purporting to be written by one Oakley.

The next four contained the same charges as to a letter purporting to be written by one Godley.

The ninth count charged the prisoner with forging the letter, purporting to be signed by Oakley, with intent fraudulently to obtain, and whereby he did fraudulently obtain, a situation as police constable in the Cheshire force.

The tenth was the same as the ninth, save that it related to the letter purporting to be signed by Godley.

The eleventh was for uttering the two letters, knowing them to be forged, to the chief constable of the Cheshire force, with intent to deceive him, and obtain from him, he having power to grant it, a place in the force, and whereby he got such place.

The twelfth count was for falsely pretending that those letters were genuine, and thereby obtaining the situation of constable.

The letters were as follows:—

“Chief Constable’s Office, Carlisle,

“Nov. 4, 1857.

“Sir,—I am directed by the chief constable to acquaint you that

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

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constable Moah resigned his situation at his own request. His character very good. Inclosed I send his papers.

"I am, Sir,

"GEO. W. OAKLEY,

"Supt. C. and W. C. C."

"To all whom this may concern.

"Liverpool, May 18, 1857.

"No. 7, Pleasant Hill-street.

"Sir,—I hereby certify that I have known Chas. Moah upwards of seven years. I can say with confidence he is a sober, steady man, and I can with great confidence recommend him to the situation as police constable.

"I have had him in my employ for some time, and found him a very upright man.

"I am, yours respectfully,

"T. Dunne, Esq.

"W. GODLEY."

The prisoner forged them and uttered them to Captain Smith, the chief constable, and by the means of them got a situation as constable.

Entertaining doubts if any offence was disclosed or proved, I reserved the question and released the prisoner on bail.

G. BRAMWELL.

M'Intyre for the Crown—The case of *Reg. v. Sharman*, 1 Dearsly C. C. 285, is precisely in point, where it was held that the uttering of a forged testimonial to character, knowing it to be forged, with intent to deceive, and thereby obtain a situation, was an indictable offence, the ground of decision being that the forging of such a document was an offence at common law. [BRAMWELL, B.—That case was not cited upon the trial.] So in *Reg. v. Toshack*, 1 Den. C. C. 492, the forging of a certificate purporting to be made by the examiners of the Trinity House as to nautical skill, was held indictable at common law. [POLLOCK, C. B.—In *Reg. v. Hadgson*, 7 Cox Crim. Cas. 122, the case of forging a diploma of the College of Surgeons, by altering it so as to make it appear as if issued to the prisoner, the conviction was quashed on the ground that the prisoner had no intent to defraud at the time the diploma was forged.] The police regulations require that such a testimonial should be procured. [BRAMWELL, B.—The letters are of no validity in themselves, but they may have had an operation on the mind of him to whom they were presented. It seemed to me at the trial no more than as if I were to produce an invitation from the Duke of Wellington, and say, see what a respectable person I am.]

No counsel appeared for the prisoner.

POLLOCK, C. B.—We are all agreed that the conviction must be affirmed.

BRAMWELL, B.—It seems to me a questionable matter, but I do not say that the conviction is not right.

Conviction affirmed.

NORTHERN CIRCUIT.

YORK SPRING ASSIZES.

March 6, 1858.

(Before BYLES, J.)

REG. v. GEORGE BECKWITH AND OTHERS. (a)

*Conspiracy—Forgery—Government prosecution—Right to reply.**In a prosecution directed by the Poor Law Board, counsel for the Crown cannot claim the right to reply where the prisoner calls no witnesses.*

THE prisoners were indicted for conspiracy and for forging certain voting papers at an election of Guardians of the Poor at Leeds.

*Bliss, Q. C., Pickering, Q. C., and Haines, for the prosecution.**Overend, Q. C., and Maule, for the prisoners.**Overend called no witnesses.*

Bliss, therefore, at the close of the defence, claimed the right of reply, inasmuch as the prosecution had been directed by the Poor Law Board, and he appeared as the representative of the Attorney-General, and he quoted *Reg. v. Gardner* (1 C. & K. 628.)

BYLES, J.—I am of opinion that the right to reply where the prisoner calls no witnesses ought to be limited to the Attorney-General when prosecuting in person, and if I could do so, I would not allow it even in that case. I certainly cannot permit it under any other circumstances.

Reply refused.

(a) Reported by R. D. M. LITTLE, Esq., Barrister-at-Law.

NORTHERN CIRCUIT.

LIVERPOOL SPRING ASSIZES.

March 20, 1858.

(Before MARTIN, B.)

REG. v. JOHN ANDERSON CHRISTIE. (a)

*Murder—Attorney-General of County Palatine—Right to reply.**The Attorney-General for the County Palatine though prosecuting in person has no right to reply.*

THE prisoner was indicted for murder on the high seas.

Bliss, A. G. for the County Palatine of Lancaster, *Edward James*, Q. C., and *Aspinall*, for the prosecution.*Tindal Atkinson*, *Scott*, and *Little*, for the prisoner.*Bliss*, at the close of the case for the prosecution, claimed the reply under any circumstances, as he appeared *ex officio* as Attorney-General of the County Palatine.

MARTIN, B.—I cannot admit your claim Mr. Attorney, the right is a very objectionable one; I shall limit it wherever possible, and I wish I could prevent even the Attorney-General of England from exercising it.

Reply refused.

(a) Reported by R. D. M. LITTLE, Esq., Barrister-at-Law.

NORTHERN CIRCUIT.

LIVERPOOL SPRING ASSIZES.

March 20, 1858.

(Before MARTIN, B.)

REG. v. THOMAS RIGBY. (a)

False pretences—Attempt—Evidence.

A collier placed certain "tallies" in a tub, whereby in the ordinary course of business the tallies would have been hung on a "tally-board," and he would have received payment as if for having raised as many tubs of coal as the tallies represented :

Held, that these facts were sufficient to constitute a complete attempt to obtain money by false pretences.

THE prisoner was indicted for attempting to obtain money from his employer by false pretences. The facts, so far as was necessary to show the nature of the false pretence set out in the indictment, were as follows:—

The prisoner was a collier in the employ of Messrs. Fletcher, and the system pursued at their collieries, in order to ascertain the amount of wages to which each workman was entitled, was the "tally system." Each workman was, on going to his work, supplied with a certain number of tallies, each marked with a number corresponding with that marked against such workman's name in his employers' books. In each tub of coal got by a workman he placed one of his tallies, and the tubs with the tallies in them were then sent by rail to the canal and the tubs emptied; the tallies were all put in one tub and sent back to the pit's mouth, where they were removed by the "tally-man" and hung upon the "tally-board," over the number on that board corresponding with the number on the tally, and so showing the amount of work for which each man was entitled to be paid. These tallies were then counted by the bookkeeper and that number was booked to the credit of the workman.

Ovens for the prosecution.

Deighton for the prisoner.

(a) Reported by B. D. M. LITTLE, Esq., Barrister-at-Law.

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*Attempt to
obtain money by
false pretences.*

The evidence showed that the prisoner was seen to place three tallies in a tub, containing other tallies, which was just about to be sent back to the pit from the canal, by which means these three tallies would, in due course, have been placed on the tally-board in the usual manner; they were, however, never actually placed on the tally-board, the witness who observed him having removed the tallies from the tub and given immediate information to his employer.

Deighton, for the prisoner, submitted that these facts disclosed no offence supportable by the indictment, for that in order to constitute the offence of attempting to obtain money by false pretences, evidence must be given of a false pretence actually made, and of an attempt by means of such false pretence to obtain money, and that the false pretence must be such as might support an indictment for obtaining money by false pretences. In this case the false pretence was not complete, inasmuch as the tally never found its way into the hands of any person whose duty it was either to place it on the board or to deal with it in any way likely to lead to the obtaining of money, and that, in fact, there was nothing which could be called a false pretence practised upon any individual in particular.

MARTIN, B. (after consulting BYLES, J., who was trying civil causes.)—The facts, if proved, constitute the offence charged, the placing of the tally in the tub by the prisoner being an act done for the purpose of obtaining money which was not due to him, and with the intent that the person whose duty it was to do so should place the tally on the board whereby he would have obtained credit for work which he had not done.

The prisoner was convicted.

Ireland.

COURT OF QUEEN'S BENCH.

May 5, 1858.

(Before LEFROY, C.J., PERRIN, CRAMPTON, and O'BRIEN, JJ.)

REG. v. GALLAGHER AND TWELVE OTHERS. (a)

Bail—Conspiracy—Change of circumstances—Probability of prisoners appearing to take their trial—Trial having been postponed—Indemnification of bail.

Where an application to admit certain prisoners to bail had been refused, on the ground that a wide-spread conspiracy existed, and that a collection had been made to indemnify the bail, and after an assizes had passed by without the Crown having sent up bills for conspiracy, the application was renewed, the alleged purpose of the collection being denied on affidavit, the court ordered them to be discharged upon substantial bail being given.

THIS was an application to admit certain parties to bail who were in custody, in Lifford gaol, on a charge of sheep stealing, grounded on the informations of an approver. They had been in prison since October, 1857. Bail had been refused by the local magistrates, and the prisoners had applied to this court in November last (b) to be admitted to bail, which motion was then refused on the grounds of there existing a wide-spread conspiracy among the peasantry to destroy large quantities of sheep in the Gweedore district, and that it was unlikely that any reasonable amount of bail would have insured the attendance of the prisoners at the following assizes to take their trial on the charge, as it was likely a subscription would be got up to indemnify their sureties, and enable the accused parties to leave the country. The affidavit of the solicitor for the prisoners stated, that bills of indictment were found against them at the last assizes for sheep stealing and sheep killing; they were arraigned and pleaded not guilty; their trial was postponed on the motion of the Crown; an application was then made that they be admitted to bail, which was opposed by

(a) We are indebted to *The Irish Jurist* for the Report of this Case.

(b) See *Ir. Jur.* (N.S.) 59.

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AND
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1858.
—
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the Crown, on the grounds that the majority of this court had before refused a similar application, and that a fund subsisted, and large subscriptions were being raised, which might be applied to the indemnification of parties who might become sureties for the accused. It further stated that four other parties had been in custody on the same charge, who were equally sworn against by the same approver, and were discharged by the Crown at the last assizes, owing to the evidence being defective; that bills were sent up for a conspiracy; that no fund exists or is collecting to indemnify sureties, but ten clergymen are collecting subscriptions for the relief of the destitute inhabitants of Gweedore, and that no money is collecting for any other purpose; that this was the subscription alluded to by the counsel for the Crown at the last assizes when opposing the application then made to admit them to bail, and that all the prisoners are in the rank of small farmers. There were affidavits from each of the prisoners denying their guilt. There were also affidavits opposing the motion, made by Lord George Hill, John O'Bins Woodhouse, and Thomas Fitzgerald, the Crown solicitor, which latter only went to this, that he believed if they were kept in custody until next assizes the Crown would then have sufficient evidence to put them on their trial.

A. Norman, for the motion.—There is nothing in these affidavits to lead the court to the conclusion as to the probability of those men being brought to trial at the next assizes. If there was not an appearance of a conspiracy these men would be entitled to be discharged on bail. You cannot assume that the sum subscribed will be applied to indemnify bail. Two of the clergymen who were getting up the subscriptions have made an affidavit denying the intention to apply any part of it to such purpose, and that large sums out of the fund had been already expended in food and clothing for the poor of the distressed district. If there is a conspiracy, there are persons connected with it above the position of the traversers. On an application to admit to bail persons charged by a coroner's jury with manslaughter, the court will exercise a discretion, and if it be satisfied that the offenders will be made amenable to justice, the application will be granted: (*Regina v. Woods*, 9 J. L. 71.) This imprisonment is going on fast to punishment. The application of the subscription is sworn to. We have removed the ground of the refusal on the occasion of the last application to this court.

The *Solicitor-General*, *Smyly*, Q.C., *James Robinson*, Q.C., and *Robert Johnson*, *contra*, for the Crown.—This is not an ordinary case of sheep stealing or sheep killing. There is no denial on affidavit of the existence of the conspiracy, or that the prisoners do not participate in it; part of the subscription may be applied to the relief of bail; only one of the rev. gentlemen swears "he has not and will not apply any of this fund." [CRAMPTON, J.—Mr. Solicitor-General, how long do you ask to keep these men in gaol?] Until next assizes—when most likely they will be put on trial; and if not, they have their remedy by *habeas corpus*.

[LEFROY, C. J.—It is more a question as to the amount of bail.] There was no bill sent up against any of these parties for conspiracy. [LEFROY, C. J.—If there was, I should hesitate to comply with this application; but it is another matter where bills have been found for sheep stealing only.] No reasonable amount of bail would insure their attendance at next assizes.

R. Douse, in reply, was not called on.

LEFROY, C. J.—In this case, which came before us in November last, in the shape of an appeal from the decision of the local magistrates, who, having all the circumstances before them, and being aware of the state of the country, and having a knowledge of the facts which we could not be expected to be in possession of, refused to admit the prisoners to bail, we were then of opinion that we ought not to reverse the orders of the magistrates, but should continue those persons in custody. There had been a suggestion that, under the circumstances, it was very unlikely if allowed out on bail they would be forthcoming to take their trial. The offence charged against these persons was a conspiracy to effect a great public mischief. It was not an application to admit to bail in the ordinary case of sheep stealing, but the ground on which we acted before was, that there was a general conspiracy to perpetrate a great mischief; we, therefore, concurred with the magistrates, that it was necessary to have them amenable, to detain them in custody, as there was some probability that bail alone would not secure their attendance. Since then a very different state of circumstances has arisen. There has been an opportunity given to the Crown in the mean time of achieving the object of our order, viz.: bringing those men to trial, vindicating the law, and of putting an end to the public mischief before alluded to. No bills of indictment have been preferred for conspiracy, and though bills were sent up for sheep stealing, there is nothing to show that these acts were done in furtherance of the alleged conspiracy. The Crown has had the opportunity, since our order in November, of selecting their proceedings, and looking out for evidence to sustain the charge against the prisoners, and no bill has been preferred beyond a bill for sheep stealing. Under these circumstances it appears to us it would be a violent stretch of the jurisdiction of the court to hold these men in custody until the next assizes, they having been already in gaol since last October, and time having been given to the Crown to obtain evidence, we feel it would be entrenching very much on the principle on which this court acts in deciding applications of this nature, if we refused to admit the prisoners to bail, upon the speculation that further evidence would be procured, and upon a mere suspicion that the fund collected for charitable purposes would be applied to indemnify the sureties. It is denied by one of the trustees of that fund that there would be any such application of the money. We are not upon a mere suspicion to keep these parties in custody. On the other hand, we are not to discharge the prisoners unless they give such substantial bail as will give the

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—
Bill.

Crown a reasonable prospect of their appearing to take their trial upon the bills found against them.

CRAMPTON, J.—I am of the same opinion as my Lord Chief Justice. If this case was before us under the same circumstances as it was in November last, I would be prepared to abide by the decision I then came to thereon; as it was then, the Crown had not an opportunity to prosecute these parties. There are two circumstances I rely upon in addition to those mentioned by my Lord Chief Justice, that the former order was merely founded on the fact that there was a wide spread conspiracy through the county carried out by the wholesale destruction of sheep; there might have been an indictment for that conspiracy, but no such indictment has been preferred by the Crown; they have preferred indictments simply for sheep stealing and sheep killing, which are in their nature such as come properly within the jurisdiction of this court and the magistrates. Even supposing that the evidence which the Crown expected was in existence—and I do not mean to say that it does not exist—is the time which has elapsed to have no influence with the court? An assize having passed without bills for a conspiracy being preferred, it would be a strong measure to keep these parties in custody until next July; it would be like punishment to imprison them to insure their attendance to take their trial. We are now asked to continue these parties in custody because the Crown solicitor and the stipendiary magistrate believe they will have evidence before the next assizes; but they do not say they have it now, and as far as I see, it does not appear likely they will be in a better position then than at present. It would be very hard to keep these parties in custody on such a speculation; undoubtedly, they should give bail, not excessive, but substantial, and such as might be satisfactorily expected from men in their position.

PERRIN, J.—I remain of the opinion I formed last November. I think substantial bail should be required.

O'BRIEN, J., concurred.

By consent it was arranged that the stipendiary magistrate should measure the bail.

APPENDIX.

STATUTES AND PARTS OF STATUTES

AFFECTING THE CRIMINAL LAW, PASSED IN THE SESSION OF
PARLIAMENT OF 1855.

ADMINISTRATION OF OATHS ABROAD ACT.

18 & 19 VICT. CAP. 42.

An Act to enable British Diplomatic and Consular Agents Abroad to administer Oaths and do Notarial Acts.—[2nd July, 1855.]

WHEREAS by an act of the sixth year of King George the Fourth, 6 G. 4, c. 87. chapter eighty-seven, powers are given to British consuls general and consuls to administer oaths and do notarial acts in the foreign places to which they are appointed; and it is expedient that the like powers should be given to ambassadors and other diplomatic agents and to vice-consuls and consular agents abroad: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. From and after the passing of this act, it shall and may be lawful for every British ambassador, envoy, minister, chargé d'affaires, or secretary of embassy or of legation exercising his functions in any foreign country, and for every British vice-consul, acting consul, pro-consul, or consular agent (as well as every consul general or consul) exercising his functions in any foreign place, whenever he shall be thereto required, and whenever he shall see necessary, to administer in such foreign country or place any oath or to take any affidavit or affirmation from any person whomsoever, and also to do and perform in such foreign country or place all and every notarial acts or act which any notary public could or might be required and is by law empowered to do within the United Kingdom of Great Britain and Ireland; and every such oath, affidavit, or affirmation, and every such notarial act,

Oaths may be administered by ambassadors and other British Ministers abroad.

18 & 19 Vict.
c. 42.

*Administration
of Oaths
Abroad Act.*
—

Affidavits taken
before ambas-
sadors, &c.
abroad may be
used in courts
in the United
Kingdom.

Documents to
be admitted
in evidence
without proof
of the seal or
signature of the
ambassador or
other official
person.

Persons
swearing or
affirming falsely
guilty of
perjury.

Persons
forging seal or
signature guilty
of felony.

administered, sworn, affirmed, had, or done by or before such ambassador, envoy, minister, chargé d'affaires, secretary of embassy or of legation, vice-consul, acting consul, pro-consul, or consular agent, shall be as good, valid and effectual, and shall be of like force and effect, to all intents and purposes, as if such oath, affidavit, or affirmation, or notarial act respectively, had been administered, sworn, affirmed, had, or done before any justice of the peace or notary public in any part of the United Kingdom of Great Britain or Ireland, or before any other legal or competent authority of the like nature.

II. Affidavits and affirmations so taken as aforesaid, under the said act of King George the Fourth or this act shall and may be received, read, and made use of in and before any court of law or equity or other judicature whatever in any part of the United Kingdom, and the judges and officers thereof, in or in relation to any action, suit, cause, matter, or proceeding in or before any such court or judicature, in like manner, and shall be of the same force and effect, as affidavits and affirmations taken in or before such court or judicature, or by any person duly commissioned or authorized by such court or judicature to take such affidavits or affirmations, and shall be filed and dealt with accordingly.

III. Any document purporting to have affixed, impressed, or subscribed thereon or thereto the seal and signature of any British Ambassador, envoy, minister, chargé d'affaires, secretary of embassy or of legation, consul general, consul, vice-consul, acting consul, pro-consul, or consular agent, in testimony of any such oath, affidavit, affirmation, or act having been administered, sworn, affirmed, had, or done by or before him, shall be admitted in evidence, without proof of any such seal and signature being the seal and signature of the person whose seal and signature the same purport to be, or of the official character of such person.

IV. Any person knowingly and wilfully making any false oath, affidavit, or affirmation before any person having authority to administer such oath or take such affidavit or affirmation under the said act of King George the Fourth or this act, shall be deemed guilty of perjury, and such offender may be charged, proceeded against, tried, and dealt with in any county or place in the United Kingdom in the same manner in all respects as if the offence had been committed in such county or place.

V. If any person shall forge any such seal or signature as aforesaid, or shall tender in evidence any such document as aforesaid with a false or counterfeit seal or signature thereto, knowing the same to be false or counterfeit, he shall be guilty of felony, and shall upon conviction be liable to penal servitude for the term of four years, or to be imprisoned, with or without hard labour, for any term not exceeding three years nor less than one year; and whenever any such document has been admitted in evidence by virtue of this act, the court or the person who has admitted the same may, at the request of any party against whom the same is so admitted in evidence, direct that the same shall be impounded and be kept in the custody of some officer of the court or other proper person for such period, and subject to such conditions, as to the said court or person shall seem meet; and every person charged with committing any felony under this act may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence may be laid and charged to have been committed, in the county, district, or place in which he may be apprehended or be in custody; and every accessory before or after the fact to any such offence may be dealt with, tried, and, if convicted,

sentenced, and his offence laid and charged to have been committed, in any county, district, or place in which the principal offender may be tried. 18 & 19 Vict. c. 42.

FRIENDLY SOCIETIES ACT.

18 & 19 VICT. CAP. 63.

An Act to consolidate and amend the Law relating to Friendly Societies.
—[23rd July, 1855.]

Sect. XII. The act of the thirty-ninth of George the Third, chapter seventy-nine, and the act of the fifty-seventh of George the Third, chapter nineteen, and also the act of the fourteenth and fifteenth of her present Majesty, chapter forty-eight, relating to unlawful oaths in Ireland, shall not extend to any society established under this act or any of the acts hereby repealed, or to any meeting of the members or officers thereof in which society or at which meeting no business whatever is transacted other than that which directly and immediately relates to the objects of the society as declared in the rules thereof, and set forth in the certified copy thereof: provided, that the trustees or other officers of the society, when required under the hands of two of Her Majesty's justices of the peace, shall give full information to such justices of the nature, objects, proceedings, and practices of such society, and in default thereof the provisions of the acts herein recited shall be in force in respect of such society. Statutes as to unlawful oaths not to extend to societies under this act or any repealed acts.

XXIV. If any officer, member, or other person, being or representing himself to be a member of such society, or the nominee, executor, administrator, or assignee of a member thereof, or any person whatsoever, by false representation or imposition, shall obtain possession of any moneys, securities, books, papers, or other effects of such society, or having the same in his possession shall withhold or misapply the same, or shall wilfully apply any part of the same to purposes other than those expressed or directed in the rules of such society, or any part thereof, it shall be lawful in England for any justice of the peace acting in the county or borough in which the place of business of such society shall be situated, upon complaint made by any person on behalf of such society, to summon the person against whom such complaint is made to appear at a time and place to be named in such summons; and any two justices present at the time and place mentioned in such summons shall proceed to hear and determine the said complaint, in manner directed by the act passed in the eleventh and twelfth years of her present Majesty, chapter forty-three; and in Scotland every such offence may be prosecuted by summary complaint at the instance of the procurator fiscal of the county, or of the society, with his concurrence, before the sheriff; and if the said justices or sheriffs respectively shall determine the said complaint to be

Punishment of fraud in withholding money, &c.

18 & 19 Vict.
c. 63.

*Friendly
Societies Act.*

proved against such person, they shall adjudge and order him to deliver up all such moneys, securities, books, papers, or other effects to the society, or to repay the amount of money applied improperly, and to pay, if they think fit, a further sum of money not exceeding twenty pounds, together with costs not exceeding twenty shillings; and, in default of such delivery of effects, or repayment of such amount of money, or payment of such penalty and costs aforesaid, the said justices or sheriffs may order the said person so convicted to be imprisoned in the common gaol or house of correction, with or without hard labour, for any time not exceeding three months: provided, that nothing herein contained shall prevent the said society, or in Scotland Her Majesty's advocate, from proceeding by indictment against the said party; provided also, that no person shall be proceeded against by indictment if a conviction shall have been previously obtained for the same offence under the provisions of this act.

Circulating
false copies of
rules, &c. a
misdemeanor.

XXIX. If any person shall give to any member of a friendly society established under this act or under any of the said repealed acts, or to any person intending or applying to become a member of such society, a copy of any rules, or of any alterations or amendments of the same, other than those respectively which have been enrolled with any clerk of the peace or certified by the registrar, with a copy of his certificate appended thereto, under colour that the same are binding upon the members of such society, or shall make any alterations in or addition to any of the rules or tables of such society after they shall have been respectively enrolled or certified by the registrar, and shall circulate the same, purporting that they have been duly enrolled or certified under this or any of the said repealed acts, when they have not been so duly enrolled or certified, every person so offending shall be deemed guilty of a misdemeanor.

Rules, how
received in
evidence.

XXX. All rules and tables of any society established under this act or any of the said repealed acts, and all alterations and amendments thereof, and all copies thereof or extracts therefrom, and all writings and documents relating to a friendly society, and purporting to be signed by the registrar, shall, in the absence of any evidence to the contrary, be received in all courts of law and equity, and elsewhere, without proof of the signature thereto.

RELIGIOUS WORSHIP ACT.

18 & 19 VICT. CAP. 86.

An Act for securing the Liberty of Religious Worship.—[14th August, 1855.]

WHEREAS it is expedient that the laws affecting assemblies for religious worship should be amended : and whereas by an act passed in the first year of King William and Queen Mary, intituled *An Act for exempting Their Majesties Protestant Subjects dissenting from the Church of England from the Penalties of certain Laws*, it is enacted that no congregation or assembly for religious worship shall be permitted or allowed until the place of such meeting shall be certified and registered or recorded as described in such act : and whereas by an act passed in the fifty-second year of King George the Third, chapter one hundred and fifty-five, intituled *An Act to repeal certain Acts, and to amend other Acts, relating to Religious Worship and Assemblies, and Persons teaching or preaching therein*, it is enacted that no congregation or assembly for religious worship of Protestants (at which there shall be present more than twenty persons, besides the immediate family and servants of the person in whose house or upon whose premises such meeting, congregation, or assembly shall be held,) shall be permitted or allowed unless the place of such meeting is certified as described in such act, and that every person who shall knowingly permit or suffer any such congregation or assembly as aforesaid to meet in any place occupied by him, until the same shall have been so certified, shall forfeit for every time any such congregation or assembly shall meet a sum not exceeding twenty pounds nor less than twenty shillings, at the discretion of the justices who shall convict for such offence : be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

I. From and after the passing of this act, nothing contained in the above-mentioned acts, or in an act passed in the fifteenth and sixteenth years of the reign of Her Majesty, chapter thirty-six, shall apply to the congregations or assemblies hereinafter mentioned, or any of them ; that is to say,

1. To any congregation or assembly for religious worship held in any parish or any ecclesiastical district, and conducted by the incumbent, or in case the incumbent is not resident, by the curate of such parish or district, or by any person authorized by them respectively :
2. To any congregation or assembly for religious worship meeting in a private dwelling-house or on the premises belonging thereto.
3. To any congregation or assembly for religious worship meeting occasionally in any building or buildings not usually appropriated to purposes of religious worship :

No prosecution to be maintainable for assembling for religious worship in a place of meeting not certified.

18 & 19 Vict. c. 86. And no person permitting any such congregation to meet as herein mentioned in any place occupied by him shall be liable to any penalty for so doing.

*Religious
Worship Act.*

Construction of
certain parts
of 2 & 3 W. 4,
c. 115, and
9 & 10 Vict.
c. 59, as to
places of
worship of
Roman
Catholics and
Jews.

II. So much of an act passed in the second and third years of King William the Fourth, chapter one hundred and fifteen, as enacts that Her Majesty's subjects professing the Roman Catholic religion, in respect to their places for religious worship, shall be subject to the same laws as the Protestant Dissenters are subject to, and so much of an act passed in the ninth and tenth year of her present Majesty, chapter fifty-nine, as enacts that Her Majesty's subjects professing the Jewish religion, in respect to their places for religious worship, shall be subject to the same laws as Protestant Dissenters are subject to, shall be respectively read as applicable to the laws to which Protestant Dissenters in England are subject for the time being after the passing of this act.

YOUTHFUL OFFENDERS ACT.

18 & 19 VICT. CAP. 87.

An Act to amend the Act for the better Care and Reformation of Youthful Offenders, and the Act to render Reformatory and Industrial Schools in Scotland more available for the Benefit of Vagrant Children.
—[14th August, 1855.]

17 & 18 Vict.
c. 86.

WHEREAS it is expedient to amend the act of the last session of Parliament, chapter eighty-six, "for the better Care and Reformation of Youthful Offenders in Great Britain," so far as respects the provision thereby made for charging the parent or step-parent of an offender in certain cases with payments towards his maintenance or support: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Sects. 5 and 6
of the act
repealed.

Provision for
enforcing
contribution by
parents to the
maintenance
of juvenile
offenders in
reformatory
schools.

I. Sections five and six of the said act shall be repealed.

II. In every case in which any juvenile offender shall be detained in a reformatory school under the said act, the parent or step-parent, if of sufficient ability, shall be liable to contribute to his support and maintenance a sum not exceeding five shillings a week; and it shall be lawful in England and Wales for any two justices of the peace, upon the complaint of any person authorized by one of Her Majesty's principal Secretaries of State to take proceedings in that behalf, to summon the parent or step-parent, as the case may be, and examine into his or her ability, and (if on consideration of all the circumstances of the case they think fit) to make an order upon him or her for such weekly payment, not exceeding five shillings per week, as they shall think reasonable, during the whole or any part of the detention of such juvenile offender

in such reformatory school, such payment to be made at such times as by such order may be directed to the person so authorized to take proceedings as aforesaid, or to such person as the Secretary of State may from time to time appoint to receive the same, and by him to be accounted for and paid as the Commissioners of Her Majesty's Treasury may direct.

18 & 19 Vict.
c. 87.

*Youthful
Offenders Act.*

III. In case default be made for the space of fourteen days in payment of any sum of money which may have become payable by such parent or step-parent under such order, such sum of money shall in every such case be levied upon the goods and chattels of the defendant by distress and sale thereof; and if it shall appear to the said justices on confession of defendants or otherwise, or if it shall be returned to the warrant of distress in any such case that no sufficient goods of the party against whom such warrant shall have been issued can be found, it shall be lawful for the justice to whom such return is made, or for any other justice of the peace for the same county, riding, division, liberty, city, borough, or place, by his warrant as aforesaid, to commit the defendant to the house of correction or common gaol for any term not exceeding ten days, unless the sum to be paid, and all costs and charges of the distress, and of the commitment and conveying of the defendant to prison, (the amount thereof being ascertained and stated in such commitment,) shall be sooner paid.

Recovery of
sums ordered
to be paid.

IV. In Scotland an action for payment of sums for the support and maintenance of a juvenile offender under the said act shall and may be raised before the sheriff or any two justices of the peace within the county in which sentence was passed on the offender, or in which the defender in such action may happen to reside; and such action shall and may be brought by the Procurator Fiscal of the Sheriff Court of such county, and by no one else; and it shall be lawful for the sheriff or justices before whom such action is brought to inquire into the circumstances of the party sued, and to decern for payment of such weekly sum not exceeding five shillings per week during the period of detention of such offender as he or they shall think fit, or, in his or their discretion, to dismiss the action; and such decree for payment of a weekly sum shall be held to be and have all the effect of a decree in each week for payment of the sum ordered to be paid for such week; and the sums recovered shall be accounted for and paid as the Commissioners of Her Majesty's Treasury may direct.

Contribution
how to be
enforced in
Scotland.

V. It shall be lawful for one of Her Majesty's principal Secretaries of State, or in Scotland for the Lord Advocate, from time to time, where such Secretary of State or Lord Advocate shall in his discretion think fit, to remit all or any part of any weekly payment which may have been made payable by any order under this act.

Payments may
be remitted by
Secretary of
State or Lord
Advocate.

VI. In Scotland any two or more justices of the peace shall within the bounds of their jurisdiction have the same powers as are by the said recited act conferred on any sheriff, magistrate of a burgh, or police magistrate.

In Scotland
justices of
peace to have
same power
with sheriff.

VII. And whereas by the act of the last session of Parliament, chapter seventy-four, intituled *An Act to render Reformatory and Industrial Schools in Scotland more available for the Benefit of Vagrant Children*, certain powers are given to be exercised in Scotland by sheriffs or magistrates: be it enacted, that all such powers may be exercised by any justice of the peace in Scotland within the limits of his jurisdiction; and the word "magistrate" as used in the said last-mentioned act shall be deemed to include the words "justice of the peace."

Powers given
to sheriffs,
&c. under
17 & 18 Vict.
c. 74, may be
exercised by
justices.

CRIMINAL JUSTICE ACT.

18 & 19 VICT. CAP. 126.

An Act for diminishing Expense and Delay in the Administration of Criminal Justice in certain Cases.—[14th August, 1855.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Power to justices at petty sessions to punish persons charged with larceny, &c. summarily.

If parties accused do not consent, justices to deal with cases as if this act had not passed.

Justices to ask the accused whether he consents to the charge being summarily determined.

I. Where any person is charged before any justices of the peace assembled at such petty sessions as hereinafter provided with having committed simple larceny, and the value of the whole of the property alleged to have been stolen does not, in the judgment of such justices, exceed five shillings, or with having attempted to commit larceny from the person, or simple larceny, it shall be lawful for such justices to hear and determine the charge in a summary way, and if the person charged shall confess the same, or if such justices, after hearing the whole case for the prosecution and for the defence, shall find the charge to be proved, then it shall be lawful for such justices to convict the person charged, and commit him to the common gaol or house of correction, there to be imprisoned, with or without hard labour, for any period not exceeding three calendar months, and if they find the offence not proved they shall dismiss the charge, and make out and deliver to the person charged a certificate under their hands, stating the fact of such dismissal; and every such conviction and certificate respectively may be in the forms (A.) and (B.) in the schedule to this act, or to the like effect : provided always, that if the person charged do not consent to have the case heard and determined by such justices, or if it appear to such justices that the offence is one which, owing to a previous conviction of the person charged, is punishable by law with transportation or penal servitude, or if the justices be of opinion that the charge is, from any other circumstances, fit to be made the subject of prosecution by indictment, rather than to be disposed of summarily, such justices shall, instead of summarily adjudicating thereon, deal with the case in all respects as if this act had not been passed : provided also, that if upon the hearing of the charge such justices shall be of opinion that there are circumstances in the case which render it inexpedient to inflict any punishment, they shall have power to dismiss the person charged, without proceeding to a conviction.

II. Where the justices before whom any person is charged as aforesaid propose to dispose of the case summarily under the foregoing provisions, one of such justices, after the examinations of all the witnesses for the prosecution have been completed, and before calling upon the person charged for any statement which he may wish to make, shall state to such person the substance of the charge against him, and shall then say to him these words, or words to the like effect : " Do you consent that the charge against you shall be tried by us, or do you

desire that it shall be sent for trial by a jury at the sessions or assizes" (as the case may be): and if the person charged shall consent to the charge being summarily tried and determined as aforesaid, then the justices shall reduce the charge into writing, and read the same to such person, and shall then ask him whether he is guilty or not of such charge; and if such person shall say that he is guilty, the justices shall then proceed to pass such sentence upon him as may by law be passed, subject to the provisions of this act in respect to such offence; but if the person charged shall say that he is not guilty, the justices shall then inquire of such person whether he has any defence to make to such charge, and if he shall state that he has a defence the justices shall hear such defence, and then proceed to dispose of the case summarily.

18 & 19 Vict.
c 126.

*Criminal
Justice Act.*

III. Where any person is charged before any justices at such petty sessions as aforesaid with simple larceny (the property alleged to have been stolen exceeding in value five shillings), or stealing from the person, or larceny as a clerk or servant, and the evidence, when the case on the part of the prosecution has been completed, is in the opinion of such justices sufficient to put the person charged on his trial for the offence with which he is charged, such justices, if the case appear to them to be one which may properly be disposed of in a summary way, and may be adequately punished by virtue of the powers of this act, shall reduce the charge into writing, and shall read it to the said person, and shall then ask him whether he is guilty or not of the charge; and if such person shall say that he is guilty such justices shall thereupon cause a plea of guilty to be entered upon the proceedings, and shall convict him of such offence, and commit him to the common gaol or house of correction, there to be imprisoned, with or without hard labour, for any term not exceeding six calendar months; and every such conviction may be in the form (C.) in the schedule to this act, or to the like effect: provided always, that the said justices, before they ask such person whether he is guilty or not, shall explain to him that he is not obliged to plead or answer before them at all, and that if he do not plead or answer before them he will be committed for trial in the usual course.

Persons charged
with larceny,
&c. may plead
guilty before
justices in petty
sessions, and be
sentenced
forthwith.

Justices to
warn the
accused that he
is not obliged to
plead.

IV. In every case of summary proceeding under this act the person accused shall be allowed to make his full answer and defence, and to have all witnesses examined and cross-examined by counsel or attorney.

Persons accused
may have
assistance of
counsel, &c.

V. Where any person is charged before any justice or justices with any offence mentioned in this act, and in the opinion of such justice or justices the case may be proper to be disposed of by justices in petty sessions under this act, the justice or justices before whom such person is so charged may, if he or they see fit, remand such person for further examination to the next petty sessions, in like manner in all respects as a justice or justices are authorized to remand a party accused under the act passed in the sessions holden in the eleventh and twelfth years of Her Majesty, chapter forty-two, section twenty-one, or under the Petty Sessions Act (Ireland), 1851, section fourteen.

Power to
remand persons
charged to next
petty sessions.

VI. If any person suffered to go at large upon entering into such recognizance as the justice or justices are authorized under the last-mentioned act to take on the remand of a party accused do not afterwards appear pursuant to such recognizance, then the justices before whom he ought to have appeared shall certify (under the hand of two of them) on the back of the recognizance, to the clerk of the peace of the county or place, the fact of such non-appearance, and such recognizance shall be proceeded upon in like manner as other recognizances, and

Forfeited
recognizances to
be transmitted to
the clerk of the
peace.

- 18 & 19 Vict.
c. 126.
—
*Criminal
Justice Act.*
—
Convictions and
other proceed-
ings to be
returned to the
quarter sessions.
- Justices may
order restitution
of property.
- Petty sessions
to be an open
court, and held
for petty
sessional
division.
- 11 & 12 Vict.
c. 43, not
to apply to
proceedings
under this act.
Effect of
conviction.
- Proceedings
under this act a
bar to further
proceedings.
No conviction to
be quashed for
want of form.
- Justices may
order payment
of expenses.
- such certificate shall be deemed sufficient *prima facie* evidence of such non-appearance.
- VII. The justices adjudicating under this act shall transmit the conviction, or a duplicate of a certificate of dismissal, with the written charge, the depositions of the witnesses for the prosecution and for the defence, and the statement of the accused, to the next court of general or quarter sessions for the county or place, there to be kept by the proper officer among the records of the court; and a copy of such conviction, or of such certificate of dismissal, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction or dismissal for the offence mentioned therein in any legal proceeding whatever.
- VIII. It shall be lawful for the justices by whom any person is convicted under this act to order restitution of the property stolen, taken, or obtained by false pretences, in those cases in which the court before whom the person convicted would have been tried but for this act may be by law authorized to order restitution.
- X.* Every petty sessions for the purposes of this act shall be an open public court, and shall be the petty sessions holden for a petty sessional division; and a written or printed notice of the days and hours for holding such petty sessions shall be posted or affixed by the clerk to the justices of petty sessions upon the outside of some conspicuous part of the building or place where the same are held.
- IX.* The provisions of the act of the session holden in the eleventh and twelfth years of Her Majesty, chapter forty-three, shall not be construed as applying to any proceeding under this act.
- XI. Every conviction by justices in petty sessions under this act shall have the same effect as a conviction upon indictment for the same offence would have had, save that no conviction under this act shall be attended with any forfeiture.
- XII. Every person who obtains a certificate of dismissal or is convicted under this act shall be released from all further or other criminal proceedings for the same cause.
- XIII. No conviction, sentence, or proceeding under this act shall be quashed for want of form; and no warrant of commitment upon a conviction shall be held void by reason of any defect therein, if it be therein alleged that the offender has been convicted, and there be a good and valid conviction to sustain the same.
- XIV. Where any charge is summarily adjudicated upon under this act, or an offender is under this act convicted by justices in petty sessions upon a plea of "guilty," it shall be lawful for the justices by whom such charge has been adjudicated upon or offender convicted, upon the request of any person who has preferred the charge or appeared to prosecute or give evidence against the person charged, if such justices think fit so to do, to grant a certificate to such person of the amount of the compensation which such justices may deem reasonable for his expenses, trouble, and loss of time therein, subject nevertheless to the regulations made or to be made as hereinafter mentioned; and every such certificate shall, when granted in England, have the effect of an order of court for the payment of the expenses of a prosecution made under the act of the seventh year of King George the Fourth, chapter sixty-four, and the acts amending the same, and when granted in Ireland shall have the

* Sic in act.

effect of an order of court for the payment of the expenses of a prosecution made under the act of the fifty-fifth year of King George the Third, chapter ninety-one, and the acts amending the same; and the amount mentioned in such certificate shall be paid in like manner as the money mentioned in such order of court; and all certificates to be granted under this act shall be subject to the like regulations made or to be made in relation thereto as the certificates mentioned in the said act of the seventh year of King George the Fourth to be granted by examining magistrates are or may be subject to under the act of the session holden in the fourteenth and fifteenth years of Her Majesty, chapter fifty-five: provided also, that the amount of the fees payable to the clerks of the magistrates in petty sessions, in respect of any proceeding under this act, and of the fees payable to the clerks of the peace for filing the depositions, conviction, or certificate of dismissal aforesaid, and of all such expenses of apprehending the person charged, and detaining him in custody, and of such other expenses as are now by law payable when incurred before a commitment for trial, may be added to the certificate for compensation aforesaid, and paid in the like manner.

18 & 19 Vict.
c. 126.

*Criminal
Justice Act.*

XV. In every city, borough, town, or place in England where any petty sessions shall be holden under this act, the town hall, court house, &c. or other public building therein belonging to any county, city, borough, town, or place, or any court house in such city, borough, town, or place provided by the Commissioners of Her Majesty's Treasury, under the act of the session holden in the ninth and tenth years of Her Majesty, chapter ninety-five, may be used for the purpose of holding such petty sessions, without any charge for rent or other payment, save and except the reasonable and necessary charges for lighting, warming, and cleaning, when such public building is used for the purpose of holding such courts of petty sessions, and for all other expenses necessarily incidental to the use of the said building for the purposes of the said courts: provided always, that the necessary arrangements shall be made so that the sittings of the said courts of petty sessions shall not interfere with the business of the county, city, borough, town, or place or other business usually transacted in such town hall, court house, or other public building, or any purpose for which any such town hall, court house, or other public building may be used by virtue of any act of Parliament in that behalf.

XVI. Any one of the magistrates appointed to act at any of the police courts of the metropolis, and sitting at a police court within the Metropolitan Police District, or any magistrate appointed to act at the police courts of the Dublin metropolitan district, and sitting at a police court within the said district, or any stipendiary magistrate appointed for any city, town, liberty, borough, or district, and sitting at a police court or other place appointed in that behalf, may, in the case of persons charged before such magistrate, do alone all acts by this act authorized to be done by justices of the peace in petty sessions, and all the provisions of this act referring to justices in petty sessions shall be read and construed as referring also to such magistrate.

Any metro-
politan police
magistrate or
stipendiary
magistrate may
act alone.

XVII. Nothing in this act shall affect the provisions of the act of the session holden in the tenth and eleventh years of Her Majesty, chapter eighty-two, "For the more speedy Trial and Punishment of Juvenile Offenders," or of the act of the session holden in the thirteenth and fourteenth years of Her Majesty, chapter thirty-seven, "For the further Extension of Summary Jurisdiction in cases of Larceny," or of the "Summary Jurisdiction (Ireland) Act, 1851," and this act shall not

Nothing to
affect provisions
of 10 & 11
Vict. c. 82, and
13 & 14 Vict.

18 & 19 Vict.
c. 126.

*Criminal
Justice Act.*

As to compensa-
tion to clerks of
peace and other
officers.

extend to persons punishable under the said acts, so far as regards offences for which such persons may be punished thereunder.

XVIII. And whereas the fees and emoluments of clerks of the peace for counties and boroughs, and of other officers of the courts of quarter sessions, in criminal proceedings, may be seriously diminished by the operation and effect of this act, and it is just and reasonable that full compensation for any such loss should be made in respect thereof to such clerks of the peace and other officers appointed before the passing of this act: be it enacted, that immediately after the passing of this act the Commissioners of Her Majesty's Treasury shall, upon the application of any such clerk of the peace or other officer, by such means and in such manner as they may think proper, inquire into and ascertain the annual amount, to be computed upon an average of five years immediately preceding the passing of this act, or of such shorter period as such clerk of the peace or other officer shall have been in office, of the fees and emoluments in criminal prosecutions received by such clerk of the peace or other officer; and the said commissioners shall, upon the like application, also ascertain, in such manner as they may think proper, the total amount of fees and emoluments in criminal prosecutions received by such clerk of the peace or other officer during any year after the passing of this act; and the said commissioners are hereby authorized and empowered, by warrant under their hands, to award to such clerk of the peace or other officer the deficiency, when and so often as the same shall occur, between the last-mentioned amount and the annual average amount so ascertained as aforesaid, and the sum so awarded shall be paid out of any moneys which may be provided by Parliament for that purpose; provided, that in all cases where any such clerk of the peace, by reason of his being paid by salary, under an order made by virtue of the act of the session holden in the fourteenth and fifteenth years of Her Majesty, chapter fifty-five, shall pay such fees and emoluments as aforesaid to the treasurer of the county or borough for which he is clerk of the peace in aid of the county or borough rate, as the case may be, such deficiency, when so ascertained as aforesaid, shall be paid to the treasurer of such county or borough respectively.

Power to
increase salary
of chief magis-
trate to a sum
not exceeding
1,500*l.*

XIX. And whereas by section nine of the act of the session holden in the second and third years of Her Majesty, chapter seventy-one, provision is made for payment out of the moneys in the hands of the receiver of the metropolitan police district of such salaries as Her Majesty shall direct to the magistrates of the police courts of the metropolis, the salary to the chief magistrate not being more than one thousand two hundred pounds, and to each of the other magistrates not more than one thousand two hundred pounds: and whereas after the passing of the said act the salary of the chief magistrate was fixed at one thousand two hundred pounds, and the salaries of the other police magistrates at one thousand pounds: and whereas the duties of the said chief and other magistrates have increased, and are subject under this act to be further increased: and whereas the salaries of such other magistrates have, in consequence of such increase of duty, been increased from one thousand pounds to the limit permitted by the said act, and it is expedient to authorize such increase of the salary of the said chief magistrate as hereinafter mentioned: the salary to be paid out of the moneys aforesaid to the said chief magistrate shall be such sum yearly, not exceeding one thousand five hundred pounds, as Her Majesty may direct.

Provisions of

XX. And whereas by the act of the session holden in the fifteenth and

sixteenth years of Her Majesty, chapter seventy-three, certain powers were granted and provisions made for the payment to the several clerks of assize of annual sums for salaries, and for the expenses of their office, in respect of their duties as associates, in lieu of the fees and emoluments appertaining to those duties: and whereas it is expedient that the principle of payment by salary in lieu of fees should be further provided for, and that the clerks of assize should be so paid for the performance of all their other duties: be it therefore enacted, that all fees and emoluments heretofore payable to the clerks of assize for the performance of their duties as clerks of the Crown shall be and they are hereby abolished; and all the powers and provisions made by the before-mentioned act, except as hereinafter provided, for the payment of clerks of assize by salary in lieu of fees, in respect of their duties as associates, shall be and the same are hereby extended and made applicable to the payment of clerks of assize by salary, and the expenses of their offices, in lieu of fees and emoluments, for the performance of their duties as clerks of the Crown and of all other duties appertaining to the office of clerk of assize: provided always, that the Commissioners of Her Majesty's Treasury for the time being shall fix and determine the amount of salary to be allowed to any subordinate officer now employed or who shall hereafter be employed by any clerk of assize, and shall be empowered to order the payment of such salary to the said officers in the first instance, and not through the medium of the clerk of assize: provided also, that the salaries and expenses of the officers of the said clerks of assize for the whole of their duties on the criminal and civil sides of the court shall be paid out of any moneys which may be provided by Parliament for that purpose.

18 & 19 Vict.
c. 126.

*Criminal
Justice Act.*

15 & 16 Vict.
c. 73, for pay-
ment by salary
in lieu of fees
to clerks of
assize for their
duties as asso-
ciates extended
to the whole
office of clerk of
assize, &c.

XXI. And whereas by acts of the twelfth and fourteenth years of King Richard the Second payments are provided for justices of the peace and their clerks in each county, as wages by the day for the time of their sessions, to be payable by the sheriff, as therein mentioned, and in several counties in England sums are claimed from the sheriffs and paid in respect of such statutory wages, and it is expedient that such payments should be discontinued: be it therefore enacted, that so much of the several acts of the twelfth year of King Richard the Second, chapter ten, and of the fourteenth year of King Richard the Second, chapter twelve, or of any other act now in force as directs or authorizes the payment of wages to justices of the peace and their clerks for the time of their sessions, shall be repealed.

So much of
12 Ric. 2, c. 10,
and 14 Ric. 2,
c. 12, as directs
payment of
wages to
justices and
their clerks
repealed.

XXII. And whereas it is expedient to amend the law as to witnesses in cases of wilful or malicious injuries to property: be it further enacted, that in all cases where any justice or justices of the peace have or shall hereafter have power to order a sum of money to be forfeited and paid to the party aggrieved, as amends or compensation for any injury to property, real or personal, the right of such party to receive the money so ordered to be paid shall not be affected by such party having been examined as a witness in proof of the offence, any law or statute to the contrary notwithstanding.

In cases of
injuries to
property, parties
aggrieved may
receive compen-
sation, though
examined as
witnesses.

XXIII. In the interpretation of this act "county" shall be construed to include riding, parts, liberty, and division of a county; "borough" to include city, county of a city or town, and town corporate; "property" to include every thing included under the words "chattel, money, or valuable security," as used in the act of the session holden in the seventh and eighth years of King George the Fourth, chapter twenty-nine; and

Interpretation
of terms.

- 18 & 19 Vict. c. 126. in the case of any "valuable security" the value of the share, interest, or deposit to which the security may relate, or of the money due thereon or secured thereby, and remaining unsatisfied, or of the goods or other valuable thing mentioned in the warrant or order, shall be deemed to be the value of such security.
- Criminal Justice Act.*
- Extent of act. XXIV. This act shall not extend to Scotland.

SCHEDULE.

FORM (A.)

Conviction.

to wit. } Be it remembered, that on the day of in the year of our Lord ,
 } at in the said [county] A.B., being charged before us the undersigned of
 Her Majesty's justices of the peace for the said [county], and consenting to our deciding upon
 the charge summarily, is convicted before us, for that [he the said A.B., *etc.*, stating the offence,
and the time and place when and where committed]; and we adjudge the said A.B. for his said
 offence to be imprisoned in the [House of Correction] at in the said [county], [and
 there kept to hard labour] for the space of .
 Given under our hands and seals the day and year first above-mentioned, at in
 the [county] aforesaid.

J. S. (L.S.)
 H. M. (L.S.)

FORM (B.)

Certificate of Dismissal.

to wit. } We of Her Majesty's justices of the peace for the [county of certify,
 } that on the day of in the year of our Lord at in the said
 [county] A.B. being charged before us, and consenting to our deciding upon the charge sum-
 marily, for that [he the said A.B. *stating the offences charged, and the time and place when
 and where alleged to be committed*], we did, having summarily adjudicated thereon, dismiss the
 said charge.

Given under our hand and seals, this day of at in the [county]
 aforesaid.

J. S. (L.S.)
 H. M. (L.S.)

FORM (C.)

Conviction upon a plea of guilty.

to wit. } Be it remembered, that on the day of in the year of our Lord ,
 } at in the said [county], A.B., being charged before us, the undersigned of
 Her Majesty's justices of the peace for the said [county], for that [he the said A.B.,
etc. stating the offence, and the time and place when and where committed], and pleading
 guilty to such charge, he is thereupon convicted before us of the said offence; and we adjudge
 the said A.B. for his said offence to be imprisoned in the [House of Correction] at in
 the said [county], and there kept to hard labour] for the space of .

Given under our hands and seals, the day and year first abovementioned, at in
 the [county] aforesaid.

J. S. (L.S.)
 H. M. (L.S.)

MISCELLANEOUS PRECEDENTS.

No. I.

Indictment for a Conspiracy to Procure the Return of a Member to Parliament by means of Bribery.(a)

CENTRAL Criminal Court } The jurors for our Lady the Queen upon
to wit. } their oath present that, during all the
times in this indictment hereinafter mentioned, the borough of Derby, in
the county of Derby, was and still is an ancient borough, and that for a
long time two burgesses of the said borough have been duly elected
and sent, and have been used and accustomed, and of right ought
to have been and still of right ought to be elected and sent, to serve
as burgesses for the said borough in the Parliament of this kingdom.
And that on the first day of July, in the year of our Lord 1852,
and before the commission of either of the offences in the several
counts of this indictment hereinafter mentioned, a certain writ of our
Lady the Queen, issued out of Her Majesty's Court of Chancery, at
Westminster, directed to the sheriff of the county of Derby, whereby, after
reciting that by the advice and assent of Her Majesty's Council for
certain arduous and urgent affairs concerning her said Majesty, the
state and defence of her said Majesty's United Kingdom and the Church,
her said Majesty had ordered a certain Parliament to be holden at Her
Majesty's city of Westminster on the 20th day of August then next
ensuing, and there to treat and have conference with the prelates, great
men, and peers of her said Majesty's realm, her said Majesty commanded
and strictly enjoined the said sheriff that proclamation thereof, and of
the time and place of election being first duly made for the said county,
four knights of the most fit and discreet, girt with swords (that is to
say) two knights for each division of the said county, and for the
borough of Derby in the said county (meaning the said borough), two
burgesses of the most sufficient and discreet, freely and indifferently by
them who at such election should be present, according to the form of
the statutes in that case made and provided, he should cause to be
elected, and the names of such knights and burgesses so to be elected,
whether they might be present or absent, he should cause to be inserted
in certain indentures to be thereupon made between him and those who
should be present at such elections, and them at the day and place so
aforesaid he should cause to come in such manner that the said knights for
themselves and the commonalty of the same county, and the burgesses for
themselves and the commonalty of the said borough might have from them
full and sufficient power to do and consent to those things which then
and there by the Common Council of her said Majesty's said United
Kingdom (by the blessing of God) should happen to be ordained upon

(a) This indictment was drawn with much care and consideration by Mr. Straight, the Deputy Clerk of the Arraignment.

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the aforesaid affairs, so that for want of such power, or through an improvident election of the said knights or burgesses, the aforesaid affairs might in no wise remain unfinished, willing, nevertheless, that neither the said sheriff nor any other sheriff of her said Majesty's said United Kingdom to be in anywise elected. And the election so made distinctly and openly under his seal and the seals of those who should be present at such election the said sheriff should certify to her said Majesty in her said Majesty's Chancery at the day and place aforesaid without delay, remitting to her said Majesty one part of the aforesaid indenture annexed to the now reciting presents, together with that writ, which said writ afterwards and before the return thereof, and before the commission of either of the offences in the several counts of this indictment hereinafter mentioned was delivered to Sir Henry Sacheverel Wilmot, Baronet, who then and there, from thence, until, and at and after the return of the said writ was sheriff of the said county, to be executed in due form of law, by virtue of which said writ the said Sir Henry Sacheverel Wilmot, Baronet, being such sheriff as aforesaid, afterwards and before the return thereof, and before the commission of the offence in the several counts of this indictment hereafter mentioned, duly made his precept in writing under the seal of his said office of sheriff, directed to the mayor for the time being of the said borough of Derby, then and there being the returning officer in and for the same borough, for the election there of two burgesses for the said borough according to the said writ, by virtue of which said precept afterwards, and after due proclamation made for the holding and taking of the said election, and before the return of the said writ, and before the commission of either of the offences in the several counts of this indictment mentioned, to wit, on the 7th day of July, in the year of our Lord, 1852, the election of two burgesses for the said borough was duly had and made, and before and at the said election T. B. H., Esq., M. T. B., Esq., and L. H., Esq. were respectively candidates that they might be elected and returned to serve as the burgesses for the said borough in the aforesaid then next Parliament. And the jurors aforesaid, upon their oath aforesaid, do further present that W. B. late of the city of Westminster, G. H. R. C., late of the borough of Derby, T. M., late of the town of Shrewsbury, W. T. C., late of the borough of Derby, J. H., late of the same borough, J. C., late of the town of Nottingham, J. S., late of the town of Nottingham, C. H., late of the town of Nottingham, A. A., late of the borough of Derby, J. C., late of the same borough, T. L., late of the same borough, and divers evil-disposed persons, to wit, to the jurors aforesaid as yet unknown, unlawfully and wickedly devising and intending by corrupt and unlawful means, to procure the return of the said T. B. H., so being such candidate as aforesaid, at the election aforesaid, to serve as a burgess for the said borough in the then next Parliament, on the 5th day of July, in the year of our Lord 1852, in the county of Middlesex, and within the jurisdiction of the said Central Criminal Court, unlawfully did conspire, combine, confederate and agree together, unlawfully, wickedly and against the form of the statute in such case made and provided, by gifts and rewards, and by promises and agreements for gifts and rewards, to corrupt and procure divers persons entitled to vote at the said election for the said borough, to give their votes respectively at the said election for the said T. B. H., so being such candidate as aforesaid, and to forbear to give their votes at the said election, for the said M. T. B. and L. H. so being such other candidates as aforesaid; and the jurors aforesaid, upon their oath aforesaid

said, do further present, that the said W. B., G. H. R. C., T. M., W. T. C., J. H., J. C., J. S., C. H., A. A., J. C., T. L., and the said other evil-disposed persons devising and intending as aforesaid, in pursuance of the said conspiracy, combination, confederacy, and agreement afterwards, on the 7th day of July aforesaid, to wit, at Derby aforesaid, unlawfully, wickedly, and against the form of the said statutes, by gifts and rewards, and by promises of and agreements for gifts and rewards, did corrupt and procure one H. S., and divers other persons whose names are to the jurors aforesaid unknown, then being respectively registered voters, and entitled to vote at the said election for the said borough, to give their votes at the said election for the said T. B. H., so being such candidate as aforesaid, and divers persons whose names are to the jurors aforesaid unknown, then being such registered voters and entitled to vote as aforesaid, to forbear to give their votes at the said election for the said M. T. B. and L. H., so being such other candidates as aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said W. B., G. H. R. C., T. M., W. T. C., J. H., J. C., J. S. C. H., A. A., J. C., T. L., and the evil-disposed persons aforesaid, devising and intending as aforesaid, in further pursuance of the said conspiracy, combination, confederacy and agreement aforesaid, on the day and year last aforesaid, to wit, at Derby aforesaid, unlawfully, wickedly, corruptly and against the form of the statute in that behalf, did pay and give to the said H. S., and to divers other persons respectively, then being such registered voters as aforesaid, and having voted at the said election for the said T. B. H., divers sums of money on account of the said H. S. and of the said other voters respectively having so given their votes respectively as aforesaid, for the said T. B. H.; to the evil example of others, in contempt of our said Lady the Queen and her laws, and against the peace of our said Lady the Queen, her crown and dignity.

Second Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that after the said writ was so issued out of Her Majesty's Court of Chancery as aforesaid, directed to the said sheriff of Derbyshire, and after the same was delivered to such sheriff as aforesaid, and after the said precept was so made by the said sheriff under his seal of office, and directed to the said mayor of the said borough of Derby as aforesaid, the said election of two burgesses for the said borough was had and made as aforesaid, to wit, on the 7th day of July, in the year of our Lord 1852, at Derby aforesaid, at and before which said election the said T. B. H., M. T. B. and L. H. were respectively candidates, that they might be elected and returned to serve as burgesses for the said borough in the said then next Parliament. And the jurors aforesaid, upon their oath aforesaid, further present, that the said W. B., G. H. R. C., T. M., W. T. C., J. H., J. C., J. S., C. H., A. A., J. C., T. L., and the said evil-disposed persons, to wit, to the jurors aforesaid unknown, devising and intending as aforesaid, within the county of Middlesex, and within the jurisdiction aforesaid, on the said 5th day of July, in the year of our Lord, 1852, and after the said writ was so issued as aforesaid, and before and in anticipation of the said election, unlawfully did conspire, combine, confederate and agree together, unlawfully, wickedly and against the form of the statutes in such case made and provided, by gifts and rewards, and by promises of and agreements for gifts and rewards, to corrupt and procure divers persons whose names are to the jurors aforesaid unknown, then being entitled to vote at the

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said election for the said borough, respectively to give their votes at the said election for the said T. B. H., so being such candidate as aforesaid; and divers persons whose names are to the jurors aforesaid unknown, then being entitled to vote at such election as aforesaid, to forbear to give their votes respectively at the said election for the said M. T. B. and L. H., so being such other candidates as aforesaid; to the evil example of others, in contempt of our said Lady the Queen and her laws, and against the peace of our said Lady the Queen, her crown and dignity.

Third Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that after the said writ was so issued and delivered to the said sheriff, as in the first count of this indictment mentioned, and after the said precept was so made by the said sheriff to the said mayor, as in the first count of this indictment also mentioned; and after due proclamation made for the taking and holding of the said elections, to wit, on the 7th day of July, in the year of our Lord 1852, the said election of two burgesses for the said borough was duly had and made, at and before which said election the said T. B. H., M. T. B., and L. H., were respectively candidates from whom two might be selected and returned to serve as burgesses for the said borough, in the aforesaid then next Parliament. And the jurors aforesaid, upon their oath aforesaid, do further present that the said W. B., G. H. R. C., T. M., W. T. C., J. H., J. C., J. S., C. H., A. A., J. C. and T. L., being evil-disposed persons, and devising and intending as aforesaid, after the issuing of the said writ, and in anticipation of the said election, to wit, on the 5th day of July, in the year of our Lord 1852, within the county of Middlesex aforesaid, and within the jurisdiction aforesaid, unlawfully and wickedly did conspire, combine, confederate, and agree together, and with divers evil-disposed persons, to wit, to the jurors aforesaid, as yet unknown, against the form of the statute and statutes in such case made and provided, by gifts and rewards, and by promises of and agreements for gifts and rewards to be made by them, W. B., G. H. R. C., T. M., W. T. C., J. H., J. C., J. S., C. H., A. A., J. C., and T. L.; and the said evil-disposed persons, in corrupt collusion with one another, unlawfully to corrupt and procure divers persons entitled to vote at the said election for the said borough respectively, to wit, divers persons to be then ascertained, discovered and determined upon by them the said W. B., G. H. R. C., T. M., W. T. C., J. H., J. C., J. S., C. H., A. A., J. C., T. L., and the evil-disposed persons aforesaid, to give their votes at the said election for the said T. B. H., so being such candidate as aforesaid; and also unlawfully to corrupt and procure divers persons, to wit, divers persons to be so ascertained, discovered, and determined upon as aforesaid, and then being entitled to vote at the said election, to forbear to give their votes respectively at the said election for the said M. T. B., and L. H., so being such other candidates as aforesaid. In pursuance of which said conspiracy, combination, confederacy and agreement, they the said W. B., G. H. R. C., T. M., W. T. C., J. H., J. C., J. S., C. H., A. A., J. C., and T. L., and the said evil-disposed persons in collusion with one another afterwards, to wit, upon divers occasions, as well before as during the said election, did ascertain and discover divers persons then being voters, and entitled to vote at the said election, ready and willing to accept bribes and corrupt reward for their votes at the said election, to wit, one H. S., and divers other evil-disposed persons, to wit, to the jurors aforesaid as yet unknown, and the said W. B., G. H. R. C., T. M., W. T. C., J. H., J. C., J. S., C. H., A. A., J. C.,

and T. L., and the said evil-disposed persons in collusion with one another, by gifts and rewards, and promises of agreements for gifts and reward, on divers occasions, as well before as during the said election, to wit, at Derby aforesaid, unlawfully did corrupt and procure, and attempt to corrupt and procure, the said H. S., and others, the voters and persons entitled as aforesaid, to give their votes at the said election for the said T. B. H., and to forbear to give their votes respectively for the said M. T. B., and L. H., then and there being such candidates respectively as aforesaid; in contempt of our said Lady the Queen and her laws, to the evil and pernicious example of all other persons in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

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Fourth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that after the said writ was so issued out of her said Majesty's Court of Chancery, directed to the said sheriff of Derbyshire as aforesaid and was delivered to such sheriff as aforesaid, and after the said precept was so made by the said sheriff, under his seal of office, and directed to the said Mayor of the said borough of Derby as aforesaid, the said election of two burgesses for the said borough was had and made as aforesaid; and that the said T. B. H., M. T. B., and L. H., were respectively candidates, that they might be elected and returned to serve as burgesses for the said borough, in the said then next Parliament. And the jurors aforesaid, on their oath aforesaid, do further present, that the said W. B., G. H. R. C., T. M., W. T. C., J. H., J. C., J. S., C. H., A. A., J. C., and T. L., and the said other evil-disposed persons, to the jurors aforesaid unknown, devising and intending to interfere with and disturb the free election of burgesses to be chosen at such election to serve for the said borough in Parliament, and to procure, by corrupt and unlawful means, the return of the said T. B. H., so being such candidate as aforesaid on the 5th day of July in the year aforesaid, in the county of Middlesex aforesaid, and within the jurisdiction aforesaid, unlawfully and wickedly did conspire, combine, confederate and agree together, by bribes and by gifts, and promises of money, to persons entitled to vote at the said election, and by divers other unlawful means and devices, corruptly and unlawfully to procure the return of the said T. H. B., so being such candidate as aforesaid, at the said election, to serve for the said borough in the then next Parliament; to the evil example of others, in contempt of our said Lady the Queen and her laws, and against the peace of our said Lady the Queen, her crown and dignity.

Fifth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that after the said writ was so issued and delivered to the said sheriff, as in the first count of this indictment mentioned, and after the said precept was so made by the said sheriff to the said mayor, as in the first count of this indictment also mentioned, and after due proclamation made for the taking and holding of the said election, to wit, on the 7th day of July, in the year of our Lord 1852, the said election of two burgesses for the said borough, was duly had and made, at and before which said election the said G. B. H., M. T. B., and L. H. were respectively candidates, from whom two might be selected and returned to serve as burgesses for the said borough in the aforesaid then next Parliament. And the jurors aforesaid, upon their oath aforesaid, do further present that the said W. B., G. H. R. C., T. M., W. T. C., J. H., J. C., J. S., C. H., A. A., J. C. and T. L., being evil-disposed

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persons, and intending and devising as last aforesaid, after the issuing of the said writ, and in anticipation of the said election, to wit, on the 5th day of July, in the year of our Lord 1852, in the county of Middlesex aforesaid, and within the jurisdiction aforesaid, unlawfully and wickedly did conspire, combine, confederate and agree together, and with divers evil-disposed persons, to wit, to the jurors aforesaid unknown, by bribes and by gifts and promises of money to be made to voters, and to persons entitled to vote, at the said election, to wit, certain persons to be then ascertained, discovered, and determined upon by them, the said W. B., G. H. R. C., T. M., W. T. C., J. H., J. C., J. S., C. H., A. A., J. C. and T. L., and the evil-disposed persons aforesaid, and by divers other unlawful means and devices, corruptly and unlawfully to procure the return of the said T. B. H., so being such candidate as aforesaid, at the said election, to serve for the said borough in the said then next Parliament. In pursuance and furtherance of which said unlawful conspiracy, combination, confederacy and agreement, they the said W. B., G. H. R. C., T. M., W. T. C., J. H., J. C., J. S., C. H., A. A., J. C. and T. L., and the said evil-disposed persons aforesaid, in collusion with one another afterwards, to wit, upon divers occasions, as well before as during the said election, did ascertain and discover divers persons then and there being voters, and entitled to vote at the said election, ready and willing to accept bribes and corrupt reward for their votes at the said election, to wit, one H. S. and divers other persons, to the jurors aforesaid unknown, and the said W. B., G. H. R. C., T. M., W. T. C., J. H., J. C., J. S., C. H., J. C., T. L., and the said evil-disposed persons, in collusion with one another on divers occasions, as well before as during the said election, by bribes and by gifts and promises of and agreements for money to the said last-mentioned voters, and persons entitled to vote as aforesaid, at Derby aforesaid, unlawfully did procure, and attempt to procure, the said H. S., and other the voters and persons entitled to vote as aforesaid, to vote for the said T. B. H. at the said election, and thereby unlawfully did attempt wrongfully to procure his return at the said election to serve for the said borough in the said then next Parliament; in contempt of our said Lady the Queen and her laws, to the evil and pernicious example of all others, and against the peace of our said Lady the Queen, her crown and dignity.

Sixth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that after the said writ was so issued and delivered to the said sheriff, as in the first count of this indictment mentioned, and after the said precept was so made by the said sheriff to the said mayor, as in the first count of this indictment also mentioned, and after due proclamation made for the taking and holding of the said election, to wit, on the 7th day of July, in the year of our Lord 1852, the said election of two burgesses for the said borough was duly had and made, as in the first count of this indictment also mentioned, at and before which said election the said T. B. H., M. T. B. and L. H., were respectively candidates, from whom two might be selected and returned to serve as burgesses for the said borough in the aforesaid then next Parliament. And the jurors aforesaid, upon their oath aforesaid, do further present that the said W. B., G. H. R. C., T. M., W. T. C., J. H., J. C., J. S., C. H., A. A., J. C. and T. L. being evil-disposed persons, and devising and intending as aforesaid, after the issuing of the said writ, and in anticipation of the said election, and after the making, passing, and coming into operation of a certain act of Parliament, made and passed

in a certain session of Parliament, holden in the fifth and sixth years of the reign of her present Majesty Queen Victoria, intituled *An Act for the better Discovery and Prevention of Bribing and Treating at the Election of Members of Parliament*, to wit, on the 5th day of July, in the year of our Lord 1852, in the County of Middlesex aforesaid, and within the jurisdiction of the said court, unlawfully and wickedly did conspire, combine, confederate and agree together, and with divers evil-disposed persons, to wit, to the jurors aforesaid as yet unknown, to ascertain and discover voters and persons entitled to vote at the said election who should be willing to receive bribes and to give their votes, and to refrain from voting at the said election, according to the will, dictation, direction, and requirement of them the said W. B., G. H. R. C., T. M., W. T. C., J. H., J. C., J. S., C. H., A. A., J. C., T. L. and the said evil-disposed persons or some or one of them, and after and during the said election, contrary to the statute and statutes in that behalf, unlawfully to make and cause to be made, and to assist one another in the making and causing to be made, payment and gifts of money to such voters for and on account of their having voted or refrained from voting at the said election, and so in manner aforesaid to commit the offence of bribery at, after, and in reference to the said election; in pursuance and furtherance of which said unlawful conspiracy, combination, confederacy, and agreement, they the said W. B., G. H. R. C., T. M., W. T. C., J. H., J. C., J. S., C. H., A. A., J. C., T. L., and the said evil-disposed persons, in collusion with one another, afterwards, to wit, upon divers occasions, as well before as during the said election, did ascertain and discover divers persons, to wit, one H. S. and divers other persons, to the jurors aforesaid unknown, then and there being voters, and entitled to vote at the said election, willing to receive bribes and to give their votes, and to refrain from voting, at the said election according to the will, dictation, direction, and requirement of them, the said W. B., G. H. R. C., T. M., W. T. C., J. H., J. C., J. S., C. H., A. A., J. C., T. L. and the evil-disposed persons aforesaid, or some or one of them. And the said W. B., G. H. R. C., T. M., W. T. C., J. H., J. C., J. S., C. H., A. A., J. C., T. L., and the said evil-disposed persons, after and during the said election, contrary to the statute and statutes in that behalf, upon divers occasions, to wit, at Derby aforesaid, unlawfully did make and cause to be made, and did aid and assist one another in the making and causing to be made payment and gifts of money to the said voters for and on account of their having voted or refrained from voting at the said election; in contempt of our said Lady the Queen and her laws, to the evil example of all others, and against the peace of our said Lady the Queen, her crown and dignity.

Seventh Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that, after the said writ was so issued and delivered to the said sheriff as in the first count of this indictment mentioned, and after the said precept was so made by the said sheriff to the said mayor as in the first count of this indictment mentioned, and after due proclamation made for the taking and holding of the said election, to wit, on the 7th day of July, in the year of our Lord 1852, the said election of two burgesses for the said borough was duly had and made as in the said first count mentioned, at and before which said election the said T. B. H., M. T. B., and L. H. were respectively candidates, from whom two might be selected and returned to serve as burgesses for the said borough in the aforesaid then next Parliament. And the jurors afore-

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said, upon their oath aforesaid, do further present that the said W. B., G. H. R. C., T. M., W. T. C., J. H., J. C., J. S., C. H., A. A., J. C. and T. L. being evil-disposed persons and devising and intending as aforesaid, after the issuing of the said writ and in anticipation of the said election, and after the making, passing, and coming into operation of the said act of Parliament in the last preceding count of this indictment mentioned, to wit, on the 5th day of July, in the year of our Lord 1852, in the county of Middlesex aforesaid, and within the jurisdiction aforesaid, unlawfully and wickedly did conspire, combine, confederate, and agree together, and with divers evil-disposed persons, to wit, to the jurors aforesaid as yet unknown, secretly to accumulate and cause to be accumulated, and to assist one another in accumulating and causing to be accumulated, divers large sums of money, to wit, at Derby aforesaid, for the purpose therewith of bribing and corrupting voters and persons entitled to vote at the said election, and during and after the said election, contrary to the statute or statutes in that behalf, unlawfully to make and cause to be made and to assist one another in the making and causing to be made, payment and gifts of, from, and out of the said money to such voters for and on account of their having voted or refrained from voting at the said election, and so in manner aforesaid to commit the offence of bribery at and after and in reference to the said election. In pursuance of which unlawful conspiracy, combination, confederacy, and agreement, they the said W. B., G. H. R. C., T. M., W. T. C., J. H., J. C., J. S., C. H., A. A., J. C., and T. L., and the said evil-disposed persons, in collusion with one another, afterwards, to wit, on the 7th day of July, in the year of our Lord 1852, at Derby aforesaid, did collect and accumulate a large sum of money, to wit, to the amount of 500*l.* and upwards, for the purpose of bribing and corrupting voters and persons entitled to vote at the said election, and on divers occasions during and after the said election, contrary to the statute and statutes in that behalf, unlawfully did make and cause to be made, and did aid and assist one another in the making and causing to be made payment and gifts of, from, and out of the said money to such voters, for and on account of their having voted or refrained from voting at the said election; in contempt of our said Lady the Queen and her laws, to the evil example of all others, and against the peace of our said Lady the Queen. her crown and dignity.

Eighth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that, after the said writ was so issued and delivered to the said sheriff as in the first count of this indictment mentioned, and after the said precept was so made by the said sheriff to the said mayor, as in the first count of this indictment mentioned, and after due proclamation made for the taking and holding of the said election, to wit, on the 7th day of July, in the year of our Lord 1852, the said election of two burgesses for the said borough was duly had and made as in the said first count also mentioned, at and before which said election the said T. B. H., M. T. B., and L. H. were respectively candidates, from whom two might be selected and retained to serve as burgesses for the said borough in the aforesaid then next Parliament. And the jurors aforesaid, upon their oath aforesaid, do further present that the said W. B., G. H. R. C., T. M., W. T. C., J. H., J. C., J. S., C. H., A. A., J. C., and T. L., being evil-disposed persons, after the issuing of the said writ, and before and in anticipation of the said election, to wit, on the 5th day of July, in the year of our Lord 1852, in the county of Middlesex aforesaid, and within the jurisdiction of the said court, unlawfully and wickedly did

conspire, combine, confederate and agree together and with divers evil-disposed persons, to wit, to the jurors aforesaid as yet unknown, unlawfully and contemptuously to interfere with, disturb, and altogether frustrate and prevent the free election of burgesses to be chosen at such election to serve for the said borough in Parliament, to wit, by influencing the electors and persons entitled to vote at the said election by bribes, gifts of money, and promises of money, and other and corrupt and unlawful reward, and under such corrupt influence, and by means thereof inducing the said electors and persons entitled as aforesaid to vote at the said election according to the will, desire, and requirement of them the said W. B., G. H. R. C., T. M., W. T. C., J. H., J. C., J. S., C. H., A. A., J. C., and T. L., and divers evil-disposed persons then acting and to act in concert and unlawful collusion with them in the premises, and as well in manner aforesaid as by divers other unlawful and corrupt ways, means, methods and devices, to wit, to the jurors aforesaid as yet unknown, to hinder, frustrate and prevent the due execution of the said writ according to the true intent, meaning and requirement of the same; in contempt of our said Lady the Queen and her laws, to the evil example of all others, and against the peace of our said Lady the Queen, her crown and dignity.

Precedents.

No. I.

Indictment for a conspiracy to procure the return of a Member of Parliament by means of bribery.

Ninth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that, after the said writ was so issued and delivered to the said sheriff as in the first count of this indictment mentioned, and after the said precept was so made by the said sheriff to the said mayor as in the first count of this indictment mentioned, and after due proclamation made for the taking and holding of the said election, to wit, on the 7th day of July, in the year of our Lord 1852, the said election for two burgesses by the said writ commanded was duly had and made according to the exigency of the said writ, to wit, at Derby aforesaid, in the county aforesaid, at and before which said election the said T. B. H., M. T. B., and L. H. were respectively candidates, from whom two might be selected and returned to serve as burgesses for the said borough in the said then next Parliament. And the jurors aforesaid, upon their oath aforesaid, do further present that the said W. B., G. H. R. C., T. M., W. T. C., J. H., J. C., J. S., C. H., A. A., J. C., and T. L. being evil-disposed persons, after the issuing of the said writ and before and in anticipation of the said election, to wit, on the 5th day of July, in the year of our Lord 1852, in the county of Middlesex aforesaid, and within the jurisdiction of the said court, unlawfully and wickedly did conspire, confederate and agree together and with divers evil-disposed persons, to wit, to the jurors aforesaid as yet unknown, wrongfully, contemptuously and unlawfully to hinder and prevent two burgesses for the said borough of Derby, being freely and indifferently elected at the said election, according to the true intent, meaning and requirement of the said writ; in great contempt of the said writ of our said Lady the Queen, and of her laws of this realm, to the evil and pernicious example of all other persons, and against the peace of our said Lady the Queen, her crown and dignity.

No. II.

Indictment against two Persons for fraudulently attempting to obtain money by falsely pretending to a Mutual Assurance Society, that they were entitled to claim from the society the amount of certain debts, which they had lost through the failure of their debtor ; with counts for conspiracy.

CENTRAL Criminal Court, } The jurors for our Lady the Queen
to wit., } upon their oath present, that heretofore and before and at the time of the committing of the several offences in the first three counts of this indictment hereinafter mentioned, and ~~at~~ the making, passing and coming into operation of a certain act of Parliament, made and passed in a certain session of Parliament, holden in the seventh and eighth years of the reign of her present Majesty Queen Victoria, intituled, *An Act for the Registration, Incorporation, and Regulation of Joint Stock Companies*, there was and still is a certain company registered, to wit, under the said act, called the Commercial Credit Mutual Assurance Society, to wit, in London, and within the jurisdiction of the said Central Criminal Court. And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore and at the time of the committing of the offence hereinafter mentioned, and whilst the said company was registered as aforesaid, the said company by a certain policy and agreement, bearing date the 24th day of June, A.D. 1852, made between the said Commercial Credit Mutual Assurance Society of the one part, and H. W. and R. B. of the other part, for the considerations therein mentioned, had covenanted and agreed to and with the said H. W. and R. B., that the premium and reward funds of the said society, mentioned in certain rules and regulations in the said agreement and policy referred to, should be liable in the manner and to the extent mentioned in such rules and regulations, to reimburse and pay to the said H. W. and R. B., their executors, administrators or assigns, such sum or sums of money as should be from time to time awarded to the said H. W. and R. B., by the council of the said society in respect of the losses which might arise to the said H. W. and R. B., from the *bonâ fide* sale and delivery during the continuance of the said agreement and policy, of goods for purposes of trade to debtors, being at the time of such sale and delivery traders within the meaning of the laws for the time being in force relating to bankrupts, and that the said H. W. and R. B. should receive such payment and reimbursements at the time, in the same manner, and subject to the conditions and stipulations mentioned and set forth in the said rules and regulations. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said H. W. and R. B. afterwards, to wit, on the 12th day of July, in the year of our Lord 1854, in London, and within the jurisdiction of the said Central Criminal Court, did prefer to the said company a certain claim upon the said company to be paid and reimbursed a large sum of money, to wit, the sum of 299*l.* 9*s.* 9*d.*, for a loss upon the sale and delivery of goods by them, the said H. W. and R. B., under and according to the said policy, and did thereby claim the said sum of 299*l.* 9*s.* 9*d.* of and from the said company, and that the said H. W. and R. B.

devising and wickedly contriving and intending to deceive the said Commercial Credit Mutual Assurance Society, and to cause the said company to procure to be awarded to the said H. W. and R. B. divers of the moneys of the said company, and to cheat and defraud the said company of the same, then and there, to wit, on the day and year aforesaid, in London aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully, knowingly and designedly did falsely pretend to the said company, that they the said H. W. and R. B., were then entitled to demand of the said company, under and by virtue of the said policy, the said sum of 299*l.* 9*s.* 9*d.*, that certain persons then carrying on business as shoe manufacturers, at 14, Lisle-street, Leicester-square, under the name, style and designation of Messrs. F. and P. were then indebted to the said H. W. and R. B. to the amount of 299*l.* 9*s.* 9*d.*, for goods sold and delivered to them by the said H. W. and R. B. for the purposes of trade. That the said claim was then *bonâ fide* made by them the said H. W. and R. B., for and in respect of a loss on goods sold and delivered. That they the said H. W. and R. B. were then able to confer on the said company the right to demand and recover, in the names of the said H. W. and R. B., from the said persons carrying on business as Messrs. F. and P. the said sum of 299*l.* 9*s.* 9*d.*, for and in respect of goods then sold and delivered to them by them the said H. W. and R. B., with intent by means of the false pretences aforesaid, unlawfully, knowingly and designedly, fraudulently to obtain from the said company divers of the moneys of the said company, to wit, to the amount of 299*l.* 9*s.* 9*d.*, and to cheat and defraud them of the same; whereas in truth and in fact, the said H. W. and R. B. were never entitled to demand of the said company the said sum of 299*l.* 9*s.* 9*d.*, under or by virtue of the said policy, or under any circumstances whatever, as they the said H. W. and R. B. so falsely pretended as aforesaid. And whereas it was not, nor is it the fact, that the said persons carrying on business as aforesaid, under the name, style, and designation of Messrs. F. and P. were indebted to the said H. W. and R. B. to the amount of 299*l.* 9*s.* 9*d.* for goods sold and delivered to them by the said H. W. and R. B. for the purposes of trade, as the said H. W. and R. B. so falsely pretended as aforesaid, or for any purpose whatever. And whereas in truth and in fact, the said claim was never *bonâ fide* made by them the said H. W. and R. B., for and in respect of a loss on goods sold and delivered. And whereas in truth and in fact the said H. W. and R. B. were not able to confer on the said company any right to demand or recover in the names of the said H. W. and R. B. from the said persons carrying on business as Messrs. F. and P., the said sum of 299*l.* 9*s.* 9*d.*, for or in respect of goods then sold and delivered by them the said H. W. and R. B. to the said persons, as they the said H. W. and R. B. so falsely pretended as aforesaid. And so the jurors aforesaid, upon their oath aforesaid, do say that the said H. W. and R. B. on the day and year in that behalf aforesaid, in London aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully, knowingly and designedly, by the false pretences aforesaid, did attempt and endeavour fraudulently, and contrary to the statute in such case made, to obtain from the said company their moneys aforesaid, and to cheat and defraud them of the same, against the peace of our said Lady the Queen, her crown and dignity.

Second Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said H. W. and R. B. deceiving and intending

Precedents.

No. II.

Indictment
against two
persons for
fraudulently
attempting to
obtain money
from a mutual
assurance
society; with
counts for
conspiracy.

Precedents.

No. II.

Indictment
against two
persons for
fraudulently
attempting to
obtain money
from a mutual
assurance
society : with
counts for
conspiracy.

to deceive, cheat, and defraud the said company afterwards, whilst the said company remained and was registered as in the first count of this indictment mentioned, to wit, on the 12th day of July, in the year of our Lord 1854, in London aforesaid, and within the jurisdiction of the said Central Criminal Court, did offer to the said company to assign to the said company a certain debt, to wit, the alleged debt hereinafter mentioned, for money and reward, to the said H. W. and R. B. in that behalf; and the said H. W. and R. B. did then and there unlawfully, knowingly and designedly falsely pretend to the said company that certain persons then carrying on business as shoe manufacturers, at 14 Lisle-street, Leicester-square, under the name, style, and designation of Messrs. F. and P. were then indebted to the said H. W. and R. B. to the amount of 299*l.* 9*s.* 9*d.* for goods sold and delivered by the said H. W. and R. B., and that they the said H. W. and R. B. were then able to confer on the said company the right to demand and recover, in the names of them the said H. W. and R. B., from the said persons carrying on business as Messrs. F. and P., the said sum of 299*l.* 9*s.* 9*d.* for and in respect of goods then sold and delivered by the said H. W. and R. B. to the said persons, with intent, by means of the false pretences aforesaid, unlawfully, knowingly and designedly, fraudulently to obtain of and from the said company divers of the moneys of the said company, to wit, to the amount of 299*l.* 9*s.* 9*d.*, and to cheat and defraud them of the same; whereas it was not nor is the fact that the said persons carrying on business as aforesaid, under the name, style, and designation of Messrs. F. and P., were indebted to the said H. W. or R. B. to the amount of 299*l.* 9*s.* 9*d.* for goods sold and delivered by the said H. W. and R. B. as the said H. W. and R. B. so falsely pretended as aforesaid. And whereas in truth and in fact the said H. W. and R. B. were not able to confer on the said company the right to demand and recover in the names of them the said H. W. and R. B., from the said persons carrying on business as Messrs. F. and P., the said sum of 299*l.* 9*s.* 9*d.* for or in respect of any goods then sold and delivered by them the said H. W. and R. B. to the said persons, as they the said H. W. and R. B. so falsely pretended as aforesaid. And so the jurors aforesaid, upon their oath aforesaid, do say that the said H. W. and R. B., on the day and year in that behalf aforesaid, in London aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully, knowingly and designedly, by the false pretences aforesaid, did attempt and endeavour fraudulently, and contrary to the statute in such case made, to obtain from the said company their moneys aforesaid, and to cheat and defraud them of the same; against the peace of our said Lady the Queen, her crown and dignity.

Third Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said H. W. and R. B., on the 12th day of July, A.D. 1854, in London, and within the jurisdiction of the said Central Criminal Court, unlawfully and wickedly did conspire, combine, confederate, and agree together by divers false pretences, and by divers unlawful, artful, indirect, fraudulent and deceitful ways, means, devices, stratagems and contrivances, to obtain and acquire to themselves of and from the said company, called the Commercial Credit Mutual Assurance Society, registered as in the first count of this indictment mentioned, divers of the moneys of the said company, to wit, to the amount of 500*l.* and upwards, and to cheat and defraud the said company of the same; against the peace of our said Lady the Queen, her crown and dignity.

Fourth Count.—And the jurors aforesaid, upon their oath aforesaid,

do further present that heretofore, and before and at the time of the commission of the several offences hereinafter firstly, secondly, and thirdly next mentioned, A. S. and others, constituting a certain society of persons trading and carrying on business under the name, style, and designation of the Commercial Credit Mutual Assurance Society, by a certain policy and agreement bearing date the 24th day of June, in the year of our Lord 1852, made between the said A. S. and others under the name, style, and designation aforesaid, of the one part, and H. W. and R. B. of the other part, for the considerations therein mentioned, had covenanted and agreed to and with the said H. W. and R. B. that the premium and reserved funds of the said society of persons mentioned in certain rules and regulations in the said policy and agreement referred to, should be liable in the manner and to the extent mentioned in such rules and regulations, to reimburse and pay to the said H. W. and R. B., their executors, administrators or assigns, such sum or sums of money as should be from time to time awarded to the said H. W. and R. B. by the council of the said society, in respect of the losses which might arise to the said H. W. and R. B., from the *bonâ fide* sale and delivery, during the continuance of the said agreement and policy, of goods for the purposes of trade, to debtors being at the time of such sale and delivery traders within the meaning of the laws for the time being in force relating to bankrupts, and that the said H. W. and R. B. should receive such payment and reimbursement at the times and in the manner and subject to the conditions and stipulations mentioned and set forth in the said rules and regulations. And the jurors aforesaid, upon their oath aforesaid, do further present that the said H. W. and R. B. afterwards, to wit, on the 12th day of July, in the year of our Lord 1854, in London, and within the jurisdiction of the said Central Criminal Court, did prefer to the said A. S. and others, as such society as aforesaid, a certain claim upon the said society to be paid and reimbursed a large sum of money, to wit, the sum of 299*l.* 9*s.* 9*d.*, for a loss upon the sale and delivery of goods by them the said H. W. and R. B. under and according to the said policy, and did thereby claim the said sum of 299*l.* 9*s.* 9*d.* of and from the said society, and that the said H. W. and R. B. devising and wickedly contriving and intending to deceive the said A. S. and others, as such society as aforesaid, and to cause the said A. S. and others to procure to be awarded to the said H. W. and R. B. divers of the moneys of the said A. S. and others as such society as aforesaid, and to cheat and defraud the said A. S. and others of the same then and there, to wit, on the day and year aforesaid, in London aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully, knowingly and designedly, did falsely pretend to the said A. S. and others that they the said H. W. and R. B. were then entitled to demand of the said A. S. and others, as such society as aforesaid, under and by virtue of the said policy, the said sum of 299*l.* 9*s.* 9*d.*; that certain persons then carrying on business as shoe manufacturers at 14, Lisle-street, Leicester-square, under the name, style and designation of Messrs. F. and P., were then indebted to the said H. W. and R. B., to the amount of 299*l.* 9*s.* 9*d.*, for goods sold and delivered to them by the said H. W. and R. B. for the purpose of trade; that the said claim was then *bonâ fide* made by them the said H. W. and R. B., for and in respect of a loss on goods sold and delivered; that they the said H. W. and R. B. were then able to confer on the said A. S. and others the right to demand and recover, in the names of the said H. W. and R. B., from the said persons

Precedents.

No. II.

Indictment
against two
persons for
fraudulently
attempting to
obtain money
from a mutual
assurance
society; with
counts for
conspiracy.

Precedents.

No 11.

Indictment
against two
persons for
fraudulently
attempting to
obtain money
from a mutual
assurance
society; with
counts for
conspiracy.

carrying on business as shoe manufacturers at 14, Lisle-street, Leicester-square, under the name, style and designation of Messrs. F. and P., the said sum of 299*l.* 9*s.* 9*d.*, for and in respect of goods then sold and delivered to them by them the said H. W. and R. B., with intent by means of the false pretences aforesaid, unlawfully, knowingly and designedly, fraudulently to obtain from the said A. S. and others, divers of the moneys of the said A. S. and others, to wit, to the amount of 299*l.* 9*s.* 9*d.*, and to cheat and defraud them of the same. Whereas in truth and in fact the said H. W. and R. B. were never entitled to demand of the said A. S. and others, as such society as aforesaid, the said sum of 299*l.* 9*s.* 9*d.*, under or by virtue of the said policy, or under any circumstances whatever, as they the said H. W. and R. B. so falsely pretended as aforesaid. And whereas it was not nor is it the fact that the said persons carrying on business as aforesaid, under the name, style, and designation of Messrs. F. and P., were indebted to the said H. W. and R. B. to the amount of 299*l.* 9*s.* 9*d.* for goods sold and delivered to them by the said H. W. and R. B. for the purposes of trade, as the said H. W. and R. B. so falsely pretended as aforesaid, or for any purposes whatever. And whereas in truth and in fact the said claim was never *bonâ fide* made by them the said H. W. and R. B. for and in respect of a loss on goods sold and delivered. And whereas in truth and in fact the said H. W. and R. B. were not able to confer on the said A. S. and others any right to demand or recover in the names of the said H. W. and R. B. from the said persons, carrying on business as aforesaid under the name, style and designation of Messrs. F. and P., the said sum of 299*l.* 9*s.* 9*d.* for or in respect of goods then sold and delivered by them the said H. W. and R. B. to the said persons, as they the said H. W. and R. B. so falsely pretended as aforesaid; and so the jurors aforesaid, upon their oath aforesaid, do say that the said H. W. and R. B., on the day and year on that behalf aforesaid, in London aforesaid, and within the jurisdiction of the Central Criminal Court, unlawfully, knowingly and designedly, by the false pretences aforesaid, did attempt and endeavour fraudulently, and contrary to the statute in such case made, to obtain from the said A. S. and others their moneys aforesaid, and to cheat and defraud them of the same; against the peace of our said Lady the Queen, her crown and dignity.

Fifth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said H. W. and R. B. deceiving and intending to deceive, cheat and defraud the said A. S. and others as such society as aforesaid, afterwards, to wit, on the 12th day of July, in the year of our Lord 1854, in London aforesaid, and within the jurisdiction of the said Central Criminal Court, did offer to the said A. S. and others to assign to the said A. S. and others, as such society as aforesaid, a certain debt, to wit, the alleged debt hereinafter mentioned for money and reward to the said H. W. and R. B. on that behalf; and the said H. W. and R. B. did then and there unlawfully, unknowingly and designedly, falsely pretend to the said A. S. and others, that certain persons then carrying on business as shoe manufacturers at 14, Lisle-street, Leicester-square, under the name, style and designation of Messrs. F. and P., were then indebted to the said H. W. and R. B. to the amount of 299*l.* 9*s.* 9*d.* for goods sold and delivered by the said H. W. and R. B., and that they the said H. W. and R. B. were then able to confer on the said A. S. and others the right to demand and recover in the names of the said H. W. and R. B. from the said persons carrying on

business as Messrs. F. and P., the said sum of 299*l.* 9*s.* 9*d.* for and in respect of goods then sold and delivered by the said H. W. and R. B. to the said persons, with intent, by means of the false pretence aforesaid, unlawfully, knowingly and designedly, fraudulently to obtain of and from the said A. S. and others, divers of the moneys of the said A. S. and others as such society as aforesaid, to wit, to the amount of 299*l.* 9*s.* 9*d.*, and to cheat and defraud them of the same. Whereas it was not nor is it the fact that the said persons carrying on business as aforesaid under the name, style and designation of Messrs. F. and P. were indebted to the said H. W. and R. B. to the amount of 299*l.* 9*s.* 9*d.* for goods sold and delivered by the said H. W. and R. B., as the said H. W. and R. B. so falsely pretended as aforesaid. And whereas in truth and in fact the said H. W. and R. B. were not able to confer on the said A. S. and others the right to demand and recover in the names of them the said H. W. and R. B. from the said persons carrying on business as Messrs. F. and P. the said sum of 299*l.* 9*s.* 9*d.* for or in respect of any goods then sold and delivered by them the said H. W. and R. B. to the said persons, as they the said H. W. and R. B. so falsely pretended as aforesaid; and so the jurors aforesaid, upon their oath aforesaid, do say that the said H. W. and R. B., on the day and year on that behalf aforesaid, in London aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully, knowingly and designedly, by the false pretences aforesaid, did attempt and endeavour, fraudulently and contrary to the statute in that case made, to obtain from the said A. S. and others, as such society as aforesaid, their moneys aforesaid, and to cheat and defraud them of the same; against the peace of our said Lady the Queen, her crown and dignity.

Precedents.

No. II

Indictment
against two
persons for
fraudulently
attempting to
obtain money
from a mutual
assurance
society; with
counts for
conspiracy.

Sixth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said H. W. and R. B., on the 12th day of July, in the year of our Lord 1854, in London, and within the jurisdiction of the said Central Criminal Court, unlawfully and wickedly did conspire, combine, confederate and agree together, by divers false pretences, and by divers unlawful, artful, indirect, fraudulent and deceitful ways, means, devices, and stratagems, and contrivances, to acquire and to obtain to themselves, of and from A. S. and others, divers of the moneys of the said A. S. and others, to wit, to the amount of 500*l.* and to cheat and defraud them of the same; against the peace of our said Lady the Queen, her crown and dignity.

No. III.

Indictment against a father for not supplying his infant child with necessary food and clothing.

CENTRAL Criminal Court, } The jurors for our Lady the Queen
to wit. } upon their oath present that, heretofore and during all the time in this count mentioned, P. H. hereinafter mentioned, was an infant of very tender age, to wit, of the age of three years or thereabouts, and by reason thereof totally unable to provide himself with any of the necessaries of life, and that during all the time hereinafter mentioned the said P. H. was under the care, charge, dominion, government and control of J. H., the father of the said P. H., to wit, in a certain dwelling-house in Montague Court, Bishopsgate-street, in the City of London, and within the jurisdiction of the said Central Criminal Court, by reason of which said several premises it became and was the duty of the said J. H., during all the time aforesaid, to provide and supply the said P. H. with food and drink necessary and proper for the nourishment and support of the said P. H., and also with raiment and apparel necessary and proper for the covering and protection of the body of the said P. H., and also with reasonable and proper bedding and the means of rest for the refreshment of the body of the said P. H.; and the jurors aforesaid, upon their oath aforesaid, do further present that the said J. H., not regarding his duty in that behalf, and wickedly disregarding the health and nurture of the said P. H., in London, and within the jurisdiction of the said Central Criminal Court, during a long space of time, to wit, from the 20th day of July, A. D., 1855, until the 22nd day of August in the same year, unlawfully, wickedly, wilfully and without any lawful excuse whatever, did make default in his duty, and during all the time aforesaid, unlawfully, wickedly, wilfully, contrary to his duty in that behalf and without any lawful excuse whatsoever, did fail and omit to provide and supply the said P. H., being such infant as aforesaid, and unable to provide himself with any of the necessaries of life, and being under such charge, government, control and dominion as aforesaid, with the food and drink necessary and proper for the nourishment and support of the said P. H., and with raiment and apparel necessary and proper for the covering and protection of the body of the said P. H., and with reasonable and proper bedding or means of rest for the refreshment of the body of the said P. H., as the said J. H. during all the time aforesaid could, might and ought to have done; and on the contrary thereof, during all the time aforesaid, unlawfully, wilfully, wickedly, contrary to his duty in that behalf and without any lawful excuse whatsoever, did keep the said P. H. in the said house, under the charge, control, government and dominion of him the said J. H., and provide the said P. H. and supply and permit the said P. H. to be provided and supplied with food and drink in such small and inadequate quantities only, and with such insufficient and inadequate raiment and apparel only, without any bedding or means of rest proper and reasonable for the refreshment of the body of the said P. H., so that by reason of the several defaults aforesaid the said P. H., during all the time aforesaid

said, did languish and pine in great weakness, sickness and infirmity of his body, and on the said 22nd day of August, A. D. 1855, became and was so grievously disordered, diseased, starved and emaciated in his body, and so injured in his health that his life was in great peril and danger and was greatly despaired of; in contempt of our said Lady the Queen and her laws, to the evil and pernicious example of all other persons in like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

Precedents.

No. III.

Indictment
against a father
for not supply-
ing his infant
child with
necessary food
and clothing.

Second Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said J. H. being the father of one P. H., an infant of very tender age, to wit, of the age of three years or thereabouts, and by reason thereof unable to take care of himself, or to supply or provide himself with any of the necessities of life, not regarding his duty of a parent or the health or nurture of the said P. H. in London, and within the jurisdiction of the said Central Criminal Court, for a long space of time, to wit, from the 20th day of July, A. D. 1855, until the 22nd day of August in the same year, during all which time the said P. H. being an infant as aforesaid, and unable to provide or supply himself with the necessities of life as aforesaid, remained and was under the charge, care, dominion, government and control of the said J. H., his father, and no other person, unlawfully, wilfully, wickedly, without any lawful excuse whatever, and contrary to his duty in that behalf, did fail and omit to supply and provide the said P. H., and to permit the said P. H. to be supplied with food and drink in sufficient quantities for the support and nourishment of his body, and with raiment and apparel necessary and proper for the covering and protection of his body, and with bedding and means of rest reasonable and proper for the refreshment of the body of the said P. H., but on the contrary during all the time aforesaid, unlawfully, wilfully, wickedly, contrary to his duty in that behalf and without any lawful excuse whatever, did provide and supply and permit the said P. H. to be provided and supplied with food and drink in such small and inadequate quantities only, and with such insufficient and inadequate raiment and apparel only, and kept the said P. H. without any bedding or the means of rest proper and reasonable for the refreshment of the body of the said P. H., so that by reason of the several defaults in this count mentioned, the said P. H. during all the time aforesaid did languish and pine in great weakness, sickness and infirmity of his body, and on the said 22nd day of August A. D. 1855, became and was so greatly disordered, diseased, starved and emaciated in his body, and so injured in his health that his life was in great peril and danger, and was greatly despaired of; in contempt of our said Lady the Queen and her laws, to the evil and pernicious example of all others in like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

Third Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said J. H. on the 1st day of August, A. D. 1855, in London, and within the jurisdiction of the said Central Criminal Court, in and upon P. H., in the peace of God and our said Lady the Queen, then and there being, unlawfully did make an assault upon the said P. H., and then and there did beat, wound and illtreat, and other wrongs to the said P. H., then and there did; against the peace of our said Lady the Queen, her crown and dignity.

No. IV.

Indictment against the mother of an infant for not supplying it with necessary food and clothing, she being furnished by her husband with ample means for so doing, and being delegated by him to act in that behalf.

CENTRAL Criminal Court, } The jurors for our Lady the Queen
to wit. } upon their oath present that, heretofore and during all the time hereinafter in this count mentioned, P. H. hereinafter mentioned was an infant of very tender age, to wit, of the age of three years or thereabouts, and by reason thereof totally unable to provide himself with any of the necessaries of life. And the jurors aforesaid, upon their oath aforesaid, do further present that, during all the time hereinafter mentioned, the said P. H. was under the power, charge, custody and dominion of J. H., the father of the said P. H., to wit, in a certain dwelling-house in Montague Court, Bishopsgate-street, in the city of London, and within the jurisdiction of the said Central Criminal Court, who during all the time aforesaid delegated the care and nurture of the said child to E., the wife of the said J. H., the mother of the said P. H., by the said J. H., her husband, and during all the time in this count mentioned, from time to time supplied the said E. his wife with proper and sufficient food and drink necessary for the support and nourishment of the said P. H., and also with sufficient raiment and apparel for the covering and protection of the body of the said P. H., and with bedding and means of rest necessary and reasonable for the refreshment of the body of the said P. H., to the intent that the said P. H. should by the said E. his mother, be properly fed, clothed, nurtured and provided for, and the said E. H. by the commandment and direction of the said J. her husband, during all the time aforesaid, took upon herself properly to feed, clothe, nurture and provide for the said P. H. By reason of which said several premises it became and was the duty of the said E. H. during all the time in this count mentioned, to provide and supply the said P. H. with such proper and sufficient food and drink necessary for the support and nourishment of the said P. H., and also with such sufficient raiment and apparel for the covering and protection of the body of the said P. H., and also with such bedding and the means of rest necessary and reasonable for the refreshment of the body of the said P. H., and also to nurture and cherish the said P. H. to the advancement of the health and strength of the said P. H. And the jurors aforesaid, upon their oath aforesaid, do further present that, the said E. H. not regarding her duty in that behalf, and wickedly disregarding the health and nurture of the said P. H., in London, and within the jurisdiction of the said Central Criminal Court, during a long space of time, to wit, from the 20th day of July, A. D. 1855, until the 22nd day of August in the same year, unlawfully, wilfully, wickedly and without any lawful excuse whatever, did make default in her said duty and during all the time aforesaid, unlawfully, wilfully, wickedly, contrary to her duty in that behalf, and without any lawful excuse whatever, did fail and omit

to provide and supply the said P. H. with such proper and sufficient food and drink necessary for the support and nourishment of the said P. H., and also with such sufficient raiment and apparel for the covering and protection of the body of the said P. H., and also with such bedding and the means of rest necessary and reasonable for the refreshment of the body of the said P. H., and to nurture and cherish the said P. H. to the advancement of the health and strength of the said P. H., as the said E. H. could, might and ought to have done, and on the contrary thereof during all the time aforesaid, unlawfully, wilfully, wickedly, contrary to her duty in that behalf, and without any lawful excuse whatever, did provide and supply the said P. H. with such food and drink in such small and inadequate quantities only, and with such insufficient and inadequate raiment and apparel only, without any bedding or the means of rest proper and reasonable for the refreshment of the body of the said P. H., and did keep the said P. H. in such a filthy, dirty, unwashed and starved condition, dangerous to the health of the said P. H., without in any way nurturing or cherishing him to the advancement of his health and strength, that the said P. H., by reason of the several defaults aforesaid during all the time aforesaid, did languish and pine in great weakness, sickness, nakedness, filth and infirmity of body, and on the said 22nd day of August, A.D. 1855, became and was so grievously disordered, diseased, starved and emaciated in his body, and so injured in his health, that his life was in great peril and danger and was greatly despaired of, in contempt of our said Lady the Queen and her laws, to the evil and pernicious example of all others in the like case offending, and against the peace of our said Lady the Queen, her Crown and dignity.

Precedents.

No. IV.

Indictment against the mother of an infant for not supplying it with necessary food and clothing, she being furnished by her husband with ample means for so doing, and being delegated by him to act in that behalf.

2nd count.—And the jurors aforesaid, upon their oath aforesaid, do further present that, heretofore and during all the time hereinafter in this count mentioned, P. H., hereinafter mentioned, was an infant of very tender age, to wit, of the age of three years or thereabouts, and by reason thereof totally unable to provide himself with any of the necessaries of life. And the jurors aforesaid, upon their oath aforesaid, do further present that, during all the time aforesaid, the said P. H. was under the power, charge, custody and dominion of J. H. his father, to wit, in a certain dwelling-house in Montague-court, Bishopsgate-street, in London, and within the jurisdiction of the said Central Criminal Court, who, during all the time aforesaid, delegated to E. his wife the care and nurture of the said P. H., the child of the said E. by the said J. her husband, who, during all the time aforesaid, from time to time supplied to the said E. his wife the proper and necessary means and authority of providing and supplying proper and sufficient food and drink necessary for the support and nourishment of the said P. H., and also sufficient raiment and apparel for the covering and protection of the body of the said P. H., and also bedding and means of rest necessary and reasonable for the refreshment of the body of the said P. H., to the intent that the said P. H. should, by the said E.—his mother, be properly fed, clothed, nurtured and provided for, and the said E. H., by the commandment and direction of the said J. H., during all the time aforesaid, took upon herself out of the means so provided as aforesaid to supply to the said P. H. the several matters and things aforesaid, and to provide, clothe, nurture and provide for the said P. H. By reason of which said several premises, it became and was the duty of the said E. H., during all time in this count mentioned, to provide and supply the said P. H. with proper and suffi-

Precedents.

No. IV.

Indictment
against the
mother of an
infant for not
supplying it
with necessary
food and
clothing, she
being furnished
by her husband
with ample
means for so
doing, and being
delegated by
him to act in
that behalf.

cient food and drink for the support and nourishment of the said P. H., and also with sufficient raiment and apparel for the covering and protection of the body of the said P. H., and also with bedding and the means of rest necessary and reasonable for the refreshment of the body of the said P. H., and also to nurture and cherish the said P. H. to the advancement of the health and strength of the said P. H.; and the jurors aforesaid, upon their oath aforesaid, do further present that the said E. H., not regarding her duty in that behalf, and wickedly disregarding the health and nurture of the said P. H., in London, and within the jurisdiction of the said Central Criminal Court, during a long space of time, to wit, from the 20th day of July, A.D. 1855, until the 22nd day of August in the same year, unlawfully, wilfully, wickedly and without any lawful excuse whatever, did make default in her said duty, and during all the time aforesaid unlawfully, wilfully, wickedly, contrary to her duty in that behalf, and, without any lawful excuse whatever, did fail and omit to provide and supply the said P. H. with proper and sufficient food and drink necessary for the support and nourishment of the said P. H., and also with sufficient raiment and apparel for the covering and protection of the body of the said P. H., and also with bedding and the means of rest necessary and reasonable for the refreshment of the body of the said P. H., and to nurture and cherish the said P. H. to the advancement of the health and strength of the said P. H. as the said E. H. could, might and ought to have done, and, on the contrary thereof, during all the time aforesaid unlawfully, wilfully, wickedly, contrary to her duty in that behalf, and without any lawful excuse whatever, did provide and supply the said P. H. with food and drink in such small and inadequate quantities only, and with such insufficient and inadequate raiment and apparel only, without any bedding or the means of rest proper and reasonable for the refreshment of the body of the said P. H., and did keep the said P. H. in such a filthy, dirty, unwashed, neglected and starved condition, without in any way nurturing or cherishing him to the advancement of his health and strength that the said P. H., by reason of the several defaults aforesaid, and during all the time aforesaid, did languish and pine in great weakness, sickness, nakedness, filth and infirmity of body, and on the said 22nd day of August in the year aforesaid, became and was so grievously disordered, diseased, starved and emaciated in his body that his life became and was in great peril and danger and was greatly despaired of, in contempt of our said Lady the Queen and her laws, to the evil and pernicious example of all others in like case offending, and against the peace of our said Lady the Queen, her Crown and dignity.

3rd count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said E. H., on the 1st day of August, A.D. 1855, in London, and within the jurisdiction of the said Central Criminal Court, in and upon P. H., in the peace of God and of our said Lady the Queen, then and there being unlawfully did make an assault upon the said P. H., and then and there did beat, wound and illtreat him, and other wrongs to the said P. H. then and there did against the peace of our said Lady the Queen, her Crown and dignity. (a)

(a) The two foregoing indictments were drawn by R. M. Straight, Esq., to whom the Reporter is indebted for the following statement of the principles on which they were framed:—

The prisoners, Peter and Eliza Hennessey, were committed for a joint misdemeanor, and some difficulty was felt in drawing an indictment which would be good as against each. The offence being one at Common Law, it became necessary to set forth those circumstances which

gave rise to the legal obligation, and it was felt that in so doing the facts which would show a duty on the part of the wife would discharge the husband from criminal responsibility: (*Rex v. Squires* cited, *Greaves Russell*, Vol. 1, 490; *Rex v. Sanders*, 7 C. & P.) A joint indictment, moreover, appeared open to the objection, that there would be a misjoinder of offences, and that it might be contended that no joint duty ever existed; as, on the authority of the before-mentioned cases, the wife's responsibility only commenced when the husband's concluded, by supplying her with necessaries. And that if, by analogy to the case *Reg. v. Plummer* (1 C. & K.), the husband having made proper provision for the child, by the supply of necessaries to the wife, it had come to his knowledge that they were being withheld, and that his primary duty revived, yet that when such primary duty revived the wife's ceased, for the fact of the husband being then under the legal obligation personally to deliver food to the child, would make the wife's concurrence then unnecessary. In other words, that the husband's legal obligation lasts until he has provided the wife necessaries, and revives when he discovers that such necessaries are being withheld. The wife's, on the other hand, endures separately and distinct from the husband for so long a time as, being supplied with necessaries, she leads the husband to trust to her willingness to supply them to the maintenance of the child. It was on such a view that these indictments were framed, that against the husband to cover the time when it might be shown in evidence he had failed to supply the wife with necessaries, or, having supplied them, was cognizant of their being withheld. That against the wife to have reference to any time when it might be made to appear, that having been supplied with necessaries to be applied by her to the nourishment of the child, she withheld them without the knowledge of her husband. The indictment against the wife is believed to be novel in its form. Cases may be supposed where there are lawful impediments to the wife delivering food provided by her husband to the children—such as separation from husband and child, sickness, and the like, so that no duty would arise out of a mere delivery to her. The indictment, therefore, was made to contain the averment that the wife took upon herself to supply to the child the necessaries provided by the husband: (vide *Reg. v. Bubb and another*, 4 Cox's Crim. Cas. 455.)

No. V.

Indictment of a Bankrupt for making false answers in an examination by the Commissioner.

CITY of Exeter, and County of the same City, } The jurors for our
to wit, } Lady the Queen
upon their oath present, that heretofore and after the making, passing
and coming into operation of "The Bankrupt Law Consolidation Act,
1849," and before and at the time of the commission of the offence here-
inafter next mentioned, M. A. P., late of the parish of St. David, in
the county of the said city of Exeter, was a trader within the meaning
of the laws then in force relating to bankrupts, and liable to become
bankrupt, and for six calendar months next immediately preceding the
time of the filing of the petition hereinafter mentioned had resided and
carried on business within the district of the Court of Bankruptcy for
the Exeter district, to wit, in the said city of Exeter and county of
the same city, and that the said M. A. P. being such trader as
aforesaid, and so liable as aforesaid, heretofore and before the commis-
sion of the offence hereinafter next mentioned, to wit, on the 20th day
of August, A.D. 1855, was justly and truly indebted to R. W. and
H. W., partners in trade, in the sum of 50*l.* and upwards, to wit, the
sum of 231*l.* 1*s.* 9*d.*, being the price and value of certain goods sold
and delivered by them to the said M. A. P., at her request, and being so
indebted and such trader as aforesaid, to wit, on the day and year afore-
said, the said M. A. P. did commit an act of bankruptcy, that is to say,

Precedents.
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 No. V.
 —
 Indictment of a
 bankrupt for
 making false
 answers on an
 examination
 by the
 commissioners.

by procuring her goods to be taken in execution. And the jurors aforesaid, upon their oath aforesaid, do further present that, thereupon and afterwards, to wit, on the 29th day of August, in the year aforesaid, the said R. W. and H. W., so being such partners in trade and such creditors as aforesaid, did present their petition to the said Court of Bankruptcy for the Exeter district, holden at Queen-street, in the city of Exeter aforesaid, and in the county of the same city, according to the form specified in schedule M. annexed to the said act, and in and by their said petition did show unto the said Court of Bankruptcy that the said M. A. P. being such trader as aforesaid, and having carried on business for six calendar months next immediately preceding the date of the said petition, within the district of the said Court of Bankruptcy for the Exeter district, that is to say, the city of Exeter aforesaid, was indebted to them in the sum of 50*l.*, and that they had been informed and believed that the said M. A. P. had then lately committed an act of bankruptcy within the true intent and meaning of the law of bankruptcy, and did therefore pray that, on proof of the requisition in that behalf, adjudication of bankruptcy might be made against the said M. A. P.; and the said R. W. then and there, to wit, on the day and year last aforesaid, in the said Court of Bankruptcy, did duly verify the truth of the said petition in the form specified in schedule N. to the said act annexed, as in and by the said petition and the said verification thereof filed in the said Court of Bankruptcy for the Exeter district aforesaid, reference being thereunto had will more fully and at large appear. And the jurors aforesaid, upon their oath aforesaid, do further present that, thereupon and afterwards, and before the commission of the offence hereinafter next mentioned, to wit, on the day and year last aforesaid, the said Court of Bankruptcy did, under the said petition, proceed to receive proof of the said debt and of the said trading of the said M. A. P. and of her said act of bankruptcy, and then, to wit, on the day and year last aforesaid, upon proof thereof made to the said Court of Bankruptcy in that behalf, did adjudge the said M. A. P. to be bankrupt, a duplicate of which said adjudication afterwards and before the commission of the offence hereinafter next mentioned, to wit, on the day and year last aforesaid, and before notice of such adjudication was given in the *London Gazette* as hereinafter mentioned, was served upon the said M. A. P. by leaving the same at the usual and last known place of business of the said M. A. P., to wit, at No. 2, Queen-street, in the city of Exeter aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present that, afterwards and after the expiration of seven days from the said adjudication and the said service of the said duplicate, to wit, on the day of , in the year aforesaid, no cause having been shown in the meantime to the satisfaction of the said Court of Bankruptcy for the annulling of the said adjudication, the said Court of Bankruptcy did cause notice and advertisement of the said filing of the said petition and of the said adjudication to be, and the same was, given in the *London Gazette*, and the said Court of Bankruptcy did, by the said notice and advertisement, appoint two public sittings of the said Court of Bankruptcy for the said M. A. P. to surrender and conform according to law, the first of which said sittings was thereby then and there appointed for the 13th day of September then next, at the hour of one of the clock in the afternoon thereof precisely, and the last of which said sittings was thereby then and there appointed for the 11th day of October then next, at the hour of one of the clock in the afternoon thereof

precisely, which said last mentioned day was a day not less than thirty days and not exceeding sixty days from the said notice and advertisement in the *London Gazette* as aforesaid, and was the day limited for the surrender of the said M. A. P., to wit, under the said petition. And the jurors aforesaid, upon their oath aforesaid, do further present that afterward and after such notice and advertisement in the *London Gazette* as aforesaid, to wit, on the day of in the year aforesaid, notice in writing of the said M. A. P. having been so adjudged and declared bankrupt as aforesaid, and of the said sittings and of the said day and hour limited for such surrender as aforesaid, was left at the usual and last known place of business of the said M. A. P. (she not then being in prison), to wit, at No. 2, Queen-street, in the city of Exeter aforesaid, by which said last-mentioned notice the said M. A. P. was required personally to be and appear before M. B., Esq., then being the commissioner of the said Court of Bankruptcy for the Exeter district aforesaid, and acting in the prosecution of the said petition on the said 13th day of September then next at one of the clock in the afternoon precisely, and on the said 11th day of October then next at one of the clock in the afternoon precisely, at the said Court of Bankruptcy for the Exeter district in Exeter, then and there to be examined, and to make a full and true discovery and disclosure of all her estate and effects, according to the direction of the Bankrupt Law Consolidation Act, 1849. And the jurors aforesaid, upon their oath aforesaid, do further present that afterwards, that is to say, on the 24th day of September in the year aforesaid, the said M. A. P. did surrender to and personally appear at the said Court of Bankruptcy for the Exeter district aforesaid, holden at Queen-street, in the city of Exeter aforesaid, to wit, in the parish of St. Paul in the city of Exeter aforesaid, before the said M. B., Esq., the said M. B., Esq., then being such commissioner as aforesaid, and duly acting in the prosecution of the said petition, and then and there duly made and signed the declaration contained in the schedule W. to the said act annexed, whereby she then solemnly promised and declared that she would make true answer to all such questions as might be proposed to her respecting all the property of the said M. A. P., and all dealings and transactions relating thereto, and would make a full and true disclosure of all that had been done with the said property to the best of her knowledge, information and belief (he the said M. B., Esq., such commissioner as aforesaid, having then and there competent authority to administer the said declaration to the said M. A. P. in that behalf), and was thereupon then and there duly examined and questioned before the said M. B., Esq., such commissioner as aforesaid, by word of mouth, touching and concerning matters relating to her trade, dealings and estate, and upon the said examination, and in the course of the same the following questions became and were, and each of them respectively became and was material, that is to say, whether any person of the name of R. had been indebted to the said M. A. P. in the sum of 49*l.* for goods supplied by her to him, and whether he had accepted a bill of exchange for the said sum of 49*l.*, and who the said person of the name of R. was; and also, whether any person of the name of D. had been indebted to the said M. A. P. in the sum of 57*l.* for goods supplied by her to him, and whether he had accepted a bill of exchange for that amount, and who the said person of the name of D. was; and also, whether any person of the name of S. H. had been indebted to the said M. A. P. in the sum of 66*l.* 18*s.* for

Precedents.

No. V.

Indictment of a
bankrupt for
making false
answers on an
examination
by the
commissioner.

Precedents.

No. V.

Indictment of a
bankrupt for
making false
answers on an
examination
by the
commissioner.

goods supplied by her to him, and whether he had accepted a bill of exchange for that amount, and who the said person of the name of S. H. was; and also, whether any person of the name of E. had been indebted to the said M. A. P. in the sum of 50*l.* for goods supplied by her to him, and who the said person of the name of E. was; and also, whether any person of the name of T. had been indebted to the said M. A. P. in the sum of 75*l.* for goods supplied by her to him, and whether he had accepted a bill of exchange for that amount, and who the said person of the name of T. was; and also, whether any person of the name of W. M. had been indebted to the said M. A. P. in the sum of 54*l.* 7*s.* 9*d.* for goods supplied by her to him, and whether he had accepted a bill of exchange for that amount, and who the said person of the name of W. M. was; and also, whether any person of the name of S. had been indebted to the said M. A. P. in the sum of 66*l.* 13*s.* 4*d.* for goods supplied by her to him, and whether he had accepted a bill of exchange for that amount, and who the said person of the name of S. was; and also, whether the said M. A. P. had kept or had any account in writing of or relating to the said several bills of exchange or any of them, and whether such account had been entered in any book, and whether any book in which it had been entered had been destroyed. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said M. A. P. having made and signed the said declaration, and being so examined and questioned as aforesaid, not regarding the laws of this realm, but intending to pervert the due course of justice, and to defraud the creditors of her the said M. A. P. then and there upon the said examination, upon her declaration aforesaid, in answer to divers questions which were then and there put to her by virtue of the said petition for adjudication, and of the said adjudication of bankruptcy against her the said M. A. P. as aforesaid, falsely, knowingly, maliciously, wilfully and corruptly, before the said M. B., Esq., such commissioner as aforesaid, and having such lawful and competent authority as aforesaid, to administer the said declaration in that behalf, and to take and hear the said examination, did depose and declare (amongst other things) in substance and to the effect following, that is to say: that a person of the name of R. (meaning the said person of the name of R.) had been indebted to her in the sum of 49*l.* for umbrellas and parasols supplied by her to him, that he had accepted a bill of exchange for that sum (meaning the said bill for the sum of 49*l.*), and had sent the said bill of exchange to her by letter, that he was a traveller of Devonport (meaning Devonport, in the county of Devon), and that she had had dealings with him before; and also, that a person of the name of D. (meaning the said person of the name of D.) had been indebted to her in the sum of 57*l.* for goods supplied by her to him, that he had accepted a bill of exchange for that sum (meaning the said bill of exchange for the sum of 57*l.*), that he was a traveller and hawker of umbrellas, and that he had paid her the amount of the said bill of exchange; and also, that one S. H. (meaning the said person of the name of S. H.) had been indebted to her in the sum of 66*l.* 18*s.* for goods supplied by her to him, that he had accepted a bill of exchange for that sum (meaning the said bill of exchange for the sum of 66*l.* 18*s.*), that he was a dealer in umbrellas, and lived in King-street, in Plymouth (meaning Plymouth, in the county of Devon), that she had had previous transactions with him, and that he had paid to her the said sum of 66*l.* 18*s.*; and also, that a man

called E. (meaning the said person of the name of E.) had been indebted to her in the sum of 50*l.* for goods supplied by her to him, that he had accepted a bill of exchange for that amount (meaning the said bill of exchange for the sum of 50*l.*), and that he had paid the amount of the said bill; and also, that a person of the name of T. (meaning the said person of that name) had been indebted to her in the sum of 75*l.* for goods supplied by her to him, that he had accepted a bill for that sum (meaning the said bill of exchange for the sum of 75*l.*), that he had paid that amount, that she had seen him in Exeter, that he was a hawker of umbrellas, and that he lived at Middle or Mill-street, Taunton (meaning Taunton, in the county of Somerset); and also, that one W. M. (meaning the said person of the name of W. M.) had been indebted to her in the sum of 54*l.* 7*s.* 9*d.* for goods supplied by her to him, that he had accepted a bill for that sum (meaning the said bill of exchange for the sum of 54*l.* 7*s.* 9*d.*), and that he was a draper and umbrella seller; and also, that one S. (meaning the said person of the name of S.) had been indebted to her in the sum of 66*l.* 13*s.* 4*d.*, that he had accepted a bill of exchange for that sum (meaning the said bill of exchange for 66*l.* 13*s.* 4*d.*), that he lived in Devonport (meaning Devonport, in the county of Devon), and that she knew where to go for him in Devonport; and also, that she had received different portions of the amounts of the said bills of exchange before they were due, and that she had kept an account relating to the said bills of exchange in a book, and that she had destroyed the said book by putting it into the fire. Whereas, in truth and in fact, no person of the name of R. had been indebted to the said M. A. P. in 49*l.*, or in any sum of money for umbrellas and parasols supplied by her to him, or for or on any account or consideration whatsoever; and whereas, in truth and in fact, no person of the name of R. had sent or delivered to her a bill of exchange accepted by him for that or for any sum by letter or by any other means; and whereas, in truth and in fact, there was not any person of the name of R., who was a traveller of, in, or from Devonport aforesaid; and whereas, in truth and in fact, she, the said M. A. P., had not had any dealings with a person of the name of R. And whereas, in truth and in fact, no person of the name of D. had been indebted to the said M. A. P. in 57*l.*, or in any sum for goods supplied by her to him, or for or on any account or consideration whatsoever; and whereas, in truth and in fact, he had not accepted a bill of exchange for that or for any sum of money, nor had he paid to the said M. A. P. the amount of the said, or of any, bill of exchange. And whereas, in truth and in fact, no person of the name of S. H., or of the name of H., had been indebted to the said M. A. P. in the sum of 66*l.* 18*s.*, or in any sum, for goods supplied by her to him, or for or on any account or consideration whatsoever; and whereas, in truth and in fact, no person of the name of S. H., or H., had accepted a bill of exchange for that sum, or paid the said sum, or any sum, to the said M. A. P.; and whereas, in truth and in fact, no person of the name of S. H., or H., had lived in King-street, in Plymouth aforesaid; and whereas, in truth and in fact, the said M. A. P. had not had any transactions with a person of the name of S. H., or H. And whereas, in truth and in fact, no person of the name of E. had been indebted to the said M. A. P., in the sum of 50*l.* or in any sum for goods supplied by her to him, or for or on any account or consideration whatsoever; and whereas, in truth and in fact, no person of the name of E. had accepted a bill of exchange for that sum, or had paid the amount of the said bill. And whereas, in truth and in fact, no person of the

Precedents.

No. V.

Indictment of a
bankrupt for
making false
answers on an
examination
by the
commissioner.

Precedents.

No. V.

Indictment of a
bankrupt for
making false
answers on an
examination
by the
commissioner.

name of T. had been indebted to the said M. A. P. in the sum of 75*l.*, or in any sum for goods supplied by her to him, or for or on any account or consideration whatsoever ; and whereas, in truth and in fact, no person of the name of T. had accepted a bill of exchange for that sum, or paid that amount ; and whereas, in truth and in fact, no person of the name of T. lived at or in Middle or Mill-street, in Taunton aforesaid. And whereas, in truth and in fact, no person of the name of W. M. or M. had been indebted to the said M. A. P. in the sum of 54*l.* 7*s.* 9*d.*, or in any sum for goods supplied by her to him, or on or for any account or consideration whatsoever, or had accepted a bill of exchange for that or any sum. And whereas, in truth and in fact, no person of the name of S. had been indebted to the said M. A. P. in the sum of 66*l.* 13*s.* 4*d.* or in any sum, or had accepted a bill of exchange for that sum, or lived in Devonport aforesaid. And whereas, in truth and in fact, the said M. A. P. had not received any portion of the amounts of the said bills of exchange or any of them. And whereas, in truth and in fact, the said M. A. P. had not kept an account relating to the said bills of exchange, or any of them, in any book, as the said M. A. P., at the time of her deposing and declaring as aforesaid, well knew. And so the jurors aforesaid, upon their oath aforesaid, do say that the said M. A. P., on the 24th day of September, in the year aforesaid, at the said Court of Bankruptcy for the Exeter district, in the parish aforesaid, in the said city of Exeter, before the said M. B., Esq., such commissioner as aforesaid, he, the said M. B., Esq., then and there having such power and authority as aforesaid, by her own act and consent, and of her own most wicked and corrupt mind, in manner and form aforesaid, falsely, wickedly, wilfully and corruptly did depose, state, affirm, and declare that which was false, in and to her the said M. A. P.'s knowledge at the time of her so deposing, stating, affirming and declaring as aforesaid, and did then and there falsely, wickedly, wilfully and corruptly commit wilful and corrupt perjury against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen her Crown and dignity. And the jurors aforesaid, upon their oath aforesaid, do further present that, heretofore and before the commission of the offence hereinafter next mentioned, to wit, on the 29th day of August, A.D. 1855, the said M. A. P. was, by a certain adjudication in writing, under the hand of M. B., Esq., in due form of law, adjudged and declared to be a bankrupt (he, the said M. B., Esq., then being a commissioner of the Court of Bankruptcy for the Exeter district, holden at Queen-street, in the said city of Exeter, and being then and there duly authorized and empowered to make such adjudication in that behalf, and to act in the prosecution thereof), and that after the said adjudication of her the said M. A. P. as a bankrupt as aforesaid, to wit, on the 24th day of September, in the year aforesaid, a meeting was duly holden in the said Court of Bankruptcy in the parish of St. Paul, in the city of Exeter aforesaid, before the said M. B., Esq. (so being such commissioner, and duly authorized and empowered as aforesaid to inquire touching the dealings, estate, and effects of the said M. A. P. as a trader and bankrupt as aforesaid), and that at the said meeting, on the day and year, and in the place last aforesaid, the said M. A. P. was present, and then and there duly made and signed the declaration contained in the schedule W. to the said act annexed, whereby she then solemnly promised and declared that she would make true answer to all such questions as might be proposed to

her respecting all the property of the said M. A. P., and all dealings and transactions relating thereto, and would make a full and true disclosure of all that had been done with the said property, to the best of her knowledge, information, and belief; he the said M. B., Esq., such commissioner as aforesaid, having then and there competent authority to administer the said declaration to the said M. A. P. in that behalf, and was thereupon then and there duly examined and questioned before the said M. B., Esq., such commissioner as aforesaid, by word of mouth, touching and concerning matters relating to her property, and her dealings and transactions relating thereto, and upon the last mentioned examination, and in the course of the same, the questions alleged in the first count of this indictment to have become and been material and therein set forth, became and were, and each of them respectively became and was material. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said M. A. P. having made and signed the said declaration, and being so examined and questioned as last aforesaid, not regarding the laws of this realm, but intending to pervert the due course of justice, and to defraud the creditors of her the said M. A. P. then and there upon the last-mentioned examination, upon her declaration aforesaid, in answer to divers questions which were then and there put to her, by virtue of the said adjudication of bankruptcy as last aforesaid, falsely, knowingly, maliciously, wilfully and corruptly, before the said M. B., Esq., such commissioner as aforesaid, and having such lawful and competent authority as aforesaid, to administer the said declaration in that behalf, and to take and hear the said examination, did then and there depose, state, affirm, and declare (amongst other things) in substance and effect as in the said first count she is alleged to have deposed, stated, affirmed, and declared; whereas, in truth and in fact, the said depositions, statements, and declarations were false in and to her knowledge at the time of her so deposing, stating, and declaring as aforesaid, as in the said first count alleged. And so the jurors aforesaid, upon their oath aforesaid, do say that the said M. A. P., on the day and year last aforesaid in the said Court of Bankruptcy for the Exeter district, in the parish of St. Paul, in the said city of Exeter, before the said M. B., Esq. (such commissioner as aforesaid, and then and there having such power and authority as aforesaid), by her own act and consent, and of her own most wicked and corrupt mind, in manner and form aforesaid, falsely, wickedly, wilfully, and corruptly, did depose, state, affirm and declare that which was false in and to her the said M. A. P.'s knowledge at the time of her so deposing, stating, affirming and declaring as aforesaid, and did then and there falsely, wickedly, wilfully, and corruptly commit wilful and corrupt perjury against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her Crown and dignity.

Precedents.

No. V.

Indictment of a bankrupt for making false answers on an examination by the commissioner.

STATUTES AND PARTS OF STATUTES

AFFECTING THE CRIMINAL LAW, PASSED IN THE SESSION OF
PARLIAMENT OF 1856.

TRIAL OF OFFENCES ACT.

19 VICT. CAP. 16.

An Act to empower the Court of Queen's Bench to order certain Offenders to be tried at the Central Criminal Court.—[11th April, 1856.]

WHEREAS it would contribute to the better administration of criminal justice in England and Wales if persons charged with indictable offences committed out of the jurisdiction of the Central Criminal Court were rendered liable to be tried in certain cases at the said Central Criminal Court: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:

Power to Court of Queen's Bench to order indictments removed into that court either before or after passing of this act to be tried at the Central Criminal Court.

I. Whenever any indictment or inquisition for any felony or misdemeanor committed or supposed to have been committed at any place out of the jurisdiction of the said Central Criminal Court shall have been removed by writ of certiorari into her Majesty's Court of Queen's Bench, either before or after the passing of this act, and it shall appear to such court in term time, or to any judge thereof in vacation, that it is expedient to the ends of justice that such indictment or inquisition should be tried at the said Central Criminal Court, it shall be lawful for such Court of Queen's Bench in term time, or for such judge thereof in vacation, to order that such indictment or inquisition shall be tried at the said Central Criminal Court.

When any such order has been made, the indictment shall be transmitted to the Central Criminal Court.

II. Whenever any such order shall have been made, the Queen's coroner and attorney, or other officer having the custody of the records of the said Court of Queen's Bench, shall forthwith upon notice of such order transmit such indictment or inquisition so removed by certiorari as in the preceding section mentioned, together with any depositions, examinations, or informations relating to any offence charged therein which shall be in his custody, to the proper officer of the said Central Criminal Court, to be by him kept among the records of the said Central Criminal Court.

III. Whenever any person shall have been committed or held to bail for any felony or misdemeanor committed or supposed to have been committed at any place out of the jurisdiction of the said Central Criminal Court, and it shall appear to the said Court of Queen's Bench in term time, or to any judge thereof in vacation, that it is expedient to the ends of justice that such person should be tried for such offence at the said Central Criminal Court, it shall be lawful for such Court of Queen's Bench in term time, or for such judge thereof in vacation, to order that such person shall be tried for such offence at the said Central Criminal Court, and thereupon a writ of certiorari shall be issued to the justices of oyer and terminer or of gaol delivery, or of the peace, before whom any indictment or inquisition charging such person with such offence shall then be pending, or before whom any such indictment shall thereafter be found, or to the coroner before whom any such inquisition shall have been or shall thereafter be taken, commanding them or him to certify and return such indictment or inquisition into the said Central Criminal Court.

19 Vict. c. 16.
*Trial of
Offences Act.*

The Court of Queen's Bench may order any person charged with any offence committed out of the jurisdiction of the Central Criminal Court to be tried at that court, and thereupon a certiorari shall issue to remove the indictment into the Central Criminal Court.

IV. Whenever any such order as is mentioned in any preceding section of this act shall have been made, the justice before whom any person charged with any offence by such indictment shall have been examined, the coroner before whom such inquisition shall have been taken, the clerk of assize, clerk of the peace, or any other person having the custody or possession thereof, shall forthwith, upon the delivery to him of an office copy of such order, transmit any recognizances, depositions, examinations, or informations relating to the offence charged in such indictment or inquisition which shall be in his custody or possession to the proper officer of the said Central Criminal Court, to be by him kept among the records of the said Central Criminal Court.

When any such order has been made, the depositions, &c., shall be returned to the Central Criminal Court.

V. Whenever any such order as is mentioned in any preceding section of this act shall have been made, and any indictment or inquisition shall have been transmitted or removed to the said Central Criminal Court under the provisions of this act, the gaoler or keeper of any gaol or house of correction in which any person charged with any offence by such indictment or inquisition shall be confined shall forthwith upon the delivery to him of an office copy of such order, without writ of habeas corpus or other writ for that purpose, cause such person, with his commitment and detainer, to be safely removed to Her Majesty's gaol of Newgate in the city of London; and thereupon the keeper of the said gaol of Newgate shall receive such person into his custody in the said gaol of Newgate, there to remain until he shall be delivered by due course of law.

When any such order has been made, the prisoner shall be removed to Newgate.

VI. Whenever any application shall be made to the said Court of Queen's Bench or to any judge thereof, either before or after any indictment or inquisition shall have been found or taken, for an order that any person charged with any offence by such indictment or inquisition, or committed or held to bail for any offence, shall be tried at the said Central Criminal Court, under the provisions of this act, it shall not be necessary for such person to be brought or appear in person before the said Court of Queen's Bench or the said judge thereof, either upon the making of the determination of such application, and it shall not be necessary for such person to plead any plea to such indictment or inquisition in the said Court of Queen's Bench in any case where such indictment or inquisition shall be ordered to be tried at the said Central Criminal Court under the provisions of this act.

A defendant need not appear in person or plead in the Queen's Bench.

19 Vict. c. 16.

*Trial of
Offences Act.*

A defendant shall be arraigned, plead, and be tried in the Central Criminal Court, as if the offence was committed within the jurisdiction of that court.

When a certiorari is delivered to any court to remove any indictment, such court shall bind the prosecutor and witnesses to appear on the trial.

Where a certiorari is delivered to any court to remove any indictment, such court may bail or commit any defendant who has appeared there under any recognizance.

All recognizances to be obligatory on persons entering into them to prosecute, &c., at the Central Criminal Court, if notice be given of the change of court.

Court of Queen's Bench may require party applying for a trial at the Central Criminal Court, to give notice to all parties bound by recognizance.

VII. Whenever any indictment or inquisition shall have been transmitted or removed to the said Central Criminal Court, under the provisions of this act, any person charged with any offence by such indictment or inquisition shall be arraigned and shall plead to such indictment or inquisition, and shall be tried in the said Central Criminal Court, in the same manner in all respects as if such offence had been actually committed within the jurisdiction of the said Central Criminal Court, and as if such indictment or inquisition had been originally presented at or returned to the said Central Criminal Court.

VIII. Whenever any writ of certiorari shall be delivered to any court for the purpose of removing any indictment or inquisition from such court, such court shall require any person who shall be attending such court under any recognizance or subpoena to prosecute, or to prosecute and give evidence, or to give evidence, upon the trial of such indictment or inquisition, to enter into a recognizance in such sum of money as to such court shall seem fit, to prosecute, or to prosecute and give evidence, or to give evidence, as the case may be, upon the trial of such indictment or inquisition, whenever and wherever the same shall be tried.

IX. Whenever any writ of certiorari shall be delivered to any court for the purpose of removing any indictment or inquisition from such court, it shall be lawful for such court either to require any person who shall be attending such court under any recognizance to take his trial upon such indictment or inquisition to enter into such recognizance, with so many sureties, and in such sum or sums of money, and with such condition for his appearance and taking his trial upon such indictment or inquisition, whenever and wherever the same shall be tried, as to such court shall seem fit, or to commit such person to the common gaol or house of correction for the county or place for which such court shall be holden, there to remain until he shall be removed under the provisions of this act or otherwise delivered by due course of law.

X. Every recognizance which shall have been or shall be entered into for the prosecution of any person, and every recognizance, as well of any witness to give evidence as of any person to answer for any offence, shall, in case any such order shall be made for the trial of such offence at the said Central Criminal Court, be obligatory on each of the parties bound by such recognizance to prosecute and give evidence, and to do all other things therein mentioned with reference to the said trial at the said Central Criminal Court, in like manner as if such recognizance had been originally entered into for prosecuting such offence, appearing, or giving evidence, or doing such other things before the said Central Criminal Court: provided, that notice in writing shall have been given, either personally or by leaving the same at the place of residence as of which the parties bound by such recognizance are therein described, to appear before the said Central Criminal Court upon the trial of the said offence: provided also, that it shall be lawful for the said Court of Queen's Bench in term time, or for any judge thereof in vacation, to cause the party applying for such order, whether he be the prosecutor or party charged with such offence, to enter into a recognizance in such sum, and with or without sureties, as such court or judge may direct, conditioned to give such notice to the parties bound by such recognizances to appear before the said Central Criminal Court: provided also, that where it shall appear to any court to which any writ of certiorari shall be delivered, for the purpose of removing any indictment or inquisition from such court, that any person so bound by recognizance has been personally served with

any such notice as in this section is mentioned, it shall not be necessary for such court to require such person to enter into a fresh recognizance, unless it shall appear to such court that it is expedient to the ends of justice that such person should enter into such recognizance. 19 Vict. c. 16.

*Trial of
Offences Act.*

XI. Whenever any writ of certiorari shall be delivered to any court for the purpose of removing any indictment or inquisition from such court, and any person charged with any offence by such indictment or inquisition shall then be in prison, such person shall not be discharged by such court out of prison, but shall remain therein until he shall be removed under the provisions of this act or otherwise discharged by due course of law. Where a certiorari is delivered to any court the court shall not discharge any defendant then in prison.

XII. Whenever any indictment or inquisition shall have been transmitted or removed to the said Central Criminal Court, under the provisions of this act, it shall be lawful for the said Central Criminal Court to issue process for apprehending any person charged by such indictment or inquisition with any offence, and to compel the attendance of witnesses, as well on the part of the prosecution as on the part of the defence, on the trial of such indictment or inquisition, in like manner as in cases of indictments found at the said Central Criminal Court for offences committed within the jurisdiction of the said Central Criminal Court; and every such process shall and may be lawfully executed at any place within England and Wales. Process may be issued against any defendant at large, and witnesses may be compelled to attend the trial.

XIII. Whenever any indictment or inquisition shall have been transmitted or removed to the said Central Criminal Court, under the provisions of this act, it shall be lawful for the said Central Criminal Court to order such expenses of the prosecutor and witnesses, and such other expenses, and such of the several rewards payable in pursuance of any statute made or to be made, as to such Central Criminal Court shall seem reasonable and sufficient, to be paid by and to the same persons and in the same manner as if such Central Criminal Court were holden under commissions of oyer and terminer and gaol delivery for the county or place in which such indictment shall have been found or such inquisition shall have been taken. Expenses of the prosecution and rewards may be ordered to be paid.

XIV. It shall be lawful for Her Majesty, by and with the advice of Her Most Honourable Privy Council, from time to time to make rules and regulations touching the said gaol of Newgate, or any other gaol or prison, and the government and keeping thereof, for the purposes of this act, and touching the alteration of any commissions, writs, precepts, or other proceedings whatsoever for carrying into effect the purposes of this act; and all such rules and regulations shall be of the like force and effect as if the same had been made by authority of Parliament, and shall be notified in the *London Gazette*, or in such other manner as Her Majesty by and with the advice of Her Most Honourable Privy Council shall think fit to direct. Her Majesty in council may make rules to effect the purposes of this act.

XV. It shall not be lawful for any person, by himself or by his counsel, to take any objection, either in the said Central Criminal Court or in any court of error, to any writ of certiorari, or to any order of the said Court of Queen's Bench or of any judge thereof, or to any other proceedings under or by virtue of which any indictment or inquisition shall have been removed into the said Court of Queen's Bench, or transmitted or removed, under the provisions of this act, to the said Central Criminal Court, or to any caption of any court before which such indictment shall have been found, or to any matter or thing set out or appearing on the face of the record, save and except only to such indictment or inquisition alone. No objection to be taken to any writ of certiorari, order, or other proceeding for removing any indictment, &c.

19 Vict. c. 16.

*Trial of
Offences Act.*

When the indictment has been transmitted to the Central Criminal Court, shall have the same authority as if the offence had been committed within its jurisdiction.

It shall not be necessary to prove that any indictment has been properly removed or transmitted.

Verdicts and judgments to be valid.

Any person convicted may be sentenced to be punished either in the county where the offence was committed or within the jurisdiction of the Central Criminal Court.

XVI. Whenever any indictment or inquisition shall have been transmitted or removed to the said Central Criminal Court, under the provisions of this act, the justices and judges of the said Central Criminal Court for the time being, or any two or more of them, shall possess the same power, jurisdiction, and authority as to all matters and things whatsoever as if the offence charged in the said indictment or inquisition had actually been committed within the jurisdiction of the said Central Criminal Court: and every such offence may be dealt with, tried, and determined by and before such justices and judges of the said Central Criminal Court, or any two or more of them, in the same manner in all respects as if the same had actually been committed within the jurisdiction of the said Central Criminal Court, and as if such indictment or inquisition had been originally presented at or returned to the said Central Criminal Court.

XVII. It shall not be necessary for any purpose whatsoever to prove that any indictment or inquisition for any offence committed or supposed to have been committed out of the jurisdiction of the said Central Criminal Court has been duly removed into the said Court of Queen's Bench, or duly transmitted or removed into the said Central Criminal Court under the provisions of this act, but every such indictment and inquisition shall be presumed to have been duly removed and transmitted or duly removed under the provisions of this act, upon production of the same in the said Central Criminal Court by the proper officer having the custody of the records of the said Central Criminal Court; and no evidence or proof to the contrary shall be admitted.

XVIII. Every verdict and judgment which shall be given upon any indictment or inquisition transmitted or removed to the said Central Criminal Court, under the provisions of this act, shall be of the same force and effect in all respects as if such indictment had been duly found, and such inquisition had been duly taken, within the jurisdiction of the said Central Criminal Court, and as if the offence charged in such indictment or inquisition had been actually committed within the jurisdiction of the said Central Criminal Court.

XIX. When any person shall have been convicted of any offence at the said Central Criminal Court upon the trial of any indictment or inquisition transmitted or removed thereto under the provisions of this act, it shall be lawful for the justices and judges of the said Central Criminal Court before whom any such conviction shall have taken place, or for any two or more of them, or, in case sentence shall not then be passed, for the justices and judges of the said Central Criminal Court, or for any two or more of them, at any subsequent sessions of the said Central Criminal Court, to order and adjudge such convict to be punished according to law at any place, either within the jurisdiction of the said Central Criminal Court, or within the county or place where such offence shall have been committed or supposed to have been committed; and in cases where such justices and judges, or any two or more of them, shall order such convict to be punished in such county or place, it shall be lawful for such justices and judges, or any two or more of them, after passing sentence upon such convict, to make an order commanding the keeper of the gaol of Newgate to cause such convict to be delivered into the custody of the gaoler or keeper of the gaol or house of correction in such county or place, together with such order, and commanding such gaoler or keeper to receive such convict into his custody in such gaol or house of correction, and him there safely to keep until such sentence shall

have been executed upon such convict according to law, or until he shall be otherwise delivered by due course of law, and also to make an order commanding the sheriff of such county or place to execute such sentence upon such convict within such county or place according to law in the same manner as if he had been tried and received such sentence in such county or place; and every such sheriff, gaoler, and keeper respectively is hereby commanded to perform and execute according to law each and every thing which he shall be commanded to perform and execute by any such order; and the several forms in the schedule to this act contained, or forms to the like effect, shall be deemed good, valid, and sufficient in law; and in the case of any order directed to any sheriff, and commanding him to execute any sentence, it shall be sufficient to deliver such order either to such sheriff or to his under sheriff.

19 Vict. c. 16.

*Trial of
Offences Act.*

XX. Whenever any person shall have been removed into the custody of the said keeper of the said gaol of Newgate, under the provisions of this act, or shall have been committed to the custody of such keeper by the said Central Criminal Court, such person shall, without writ of habeas corpus or other writ for that purpose, be removed into and from the said Central Criminal Court, when and as often as it may be necessary, by the keeper of the said gaol of Newgate, with his commitment and detainer, in order that he may be tried, sentenced, or otherwise dealt with according to law, and such removal shall not be deemed an escape.

Any prisoner removed or committed to Newgate under this act may be taken to and from the Central Criminal Court as often as necessary.

XXI. Every prisoner so removed as in any of the preceding sections of this act is mentioned shall, for and during the time of such removal, and for and during the time of his being removed back to the gaol or house of correction from which he shall have been brought, when and as often as he shall for any reason be so removed back, and also for and during such time as he may be detained in the said gaol of Newgate, or in any county gaol or county to or through which he shall have been so removed, and until he shall be delivered by due course of law, be to all intents and purposes deemed and considered to be in the proper legal custody, notwithstanding that he may in effecting such removal have been taken or detained out of the jurisdiction of the county of a city or town, or out of the jurisdiction of the county, riding, or division, to the gaol or house of correction of which he may have been originally committed, into any other jurisdiction, or out of the county or jurisdiction to the common gaol, house of correction, or court of which he has been removed into or through any other jurisdiction, county, riding, or division; and no action or other proceeding, civil or criminal, shall or may be maintained by such prisoner or any other person against the gaoler or keeper of the gaol or house of correction from which such prisoner shall have been removed, or against the gaoler or keeper of the gaol to which such prisoner shall have been removed, or against any other person, by reason or in consequence of any such removal or detainer of such prisoner, or by reason or in consequence of such prisoner having been taken out of the jurisdiction of any such county of a city or town, county, riding, or division from the gaol or house of correction of which such prisoner shall have been removed into any other jurisdiction, or out of such county or jurisdiction to the common gaol, house of correction, or court of which he shall have been removed into or through any other jurisdiction, county, riding, or division, or by reason or in consequence of any removal or detention of such prisoner under any of the provisions of this act.

Every prisoner whilst being removed or detained under this act shall be deemed to be in lawful custody.

XXII. Where any person charged with any offence by any indictment

Any defendant on bail may be

19 Vict. c. 16.

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bailed again or
committed to
Newgate.

Prosecutor and
witnesses may
be bound by
recognizance to
appear again at
the Central
Criminal Court.

The Court of
Queen's Bench
may impose
any terms
which seem
reasonable on
any defendant
applying to be
tried at the
Central
Criminal Court.

Where the
Crown obtains a
trial at the
Central
Criminal Court,
the expense of
witnesses shall
be advanced to
the defendant.

Power to court
to order
expenses of any
person acquitted
to be paid.

or inquisition transmitted or removed to the said Central Criminal Court, under the provisions of this act, shall appear before such court in pursuance of any recognizance for that purpose or otherwise, it shall be lawful for such court from time to time and as often as to the same court shall seem fit, either to require such person to enter into such recognizance, with so many sureties, and in such sum or sums of money, and with such condition for his appearance at such Central Criminal Court and otherwise, as to such Central Criminal Court shall seem fit, or to commit such person to the custody of the keeper of the said gaol of Newgate until he shall be discharged by due course of law.

XXIII. Whenever any prosecutor or witnesses, in any case where any indictment or inquisition shall have been transmitted or removed to the said Central Criminal Court under the provisions of this act, shall appear before the said Central Criminal Court, it shall be lawful for such court, from time to time and as often as to the same court shall seem fit, to require such prosecutor and witnesses to enter into such recognizance, in such sum of money, and with such condition as to appearance at the said Central Criminal Court and otherwise, as to the said Central Criminal Court shall seem fit.

XXIV. Whenever any prosecutor or person charged with any offence shall apply, either before or after any indictment or inquisition shall have been found or taken, to the said Court of Queen's Bench, or to any judge thereof, for an order that such indictment or inquisition shall be tried at the said Central Criminal Court under the provisions of this act, it shall be lawful for the said Court of Queen's Bench in term time, or for the said judge in vacation, to require such prosecutor or other person to submit to such conditions as to bail, the payment of the costs of the prosecutor and witnesses, and of the removal and transmission or removal of such indictment or inquisition, and of the removal of such defendant, and any other matter or thing whatsoever, as in the judgment of such Court of Queen's Bench or judge may reasonably be imposed upon such prosecutor or defendant.

XXV. Whenever any application shall be made on behalf of Her Majesty or of any prosecutor to the said Court of Queen's Bench, or to any judge thereof, for an order that any person charged with any offence shall be tried at the said Central Criminal Court under the provisions of this act, it shall be lawful for the said Court of Queen's Bench in term time, or for the said judge in vacation, to issue a certificate, upon the production of which the Commissioners of Her Majesty's Treasury may order to be paid out of any moneys provided by Parliament for law charges in England to the person so charged a sum not exceeding twenty pounds, to enable such person to defray the charges and expenses of the attendance of his witnesses; provided that the sum so advanced shall be allowed for in the sum which in the event of the acquittal of such person may become payable under the order hereinafter mentioned.

XXVI. In case any person who shall be tried at the said Central Criminal Court under the provisions of this act, upon an application on behalf of Her Majesty or of any prosecutor, shall be there acquitted, it shall be lawful for the justices and judges of the said Central Criminal Court before whom any such acquittal shall have taken place, or for any two or more of them, to order reimbursement to the person so acquitted of such sum as shall appear to them to have been properly expended for such removal of the trial of such person, and the Commissioners of Her Majesty's Treasury shall upon receipt of such order pay such sum

or sums out of any moneys provided by Parliament for law charges in 19 Vict. c. 16. England.

XXVII. Where any person shall have been removed or committed to the said gaol of Newgate under the provisions of this act, the treasurer of the county or place in which the offence wherewith such prisoner shall be charged shall have been committed or supposed to have been committed shall pay or cause to be paid to the keeper of the said gaol of Newgate, or to such other person as the visiting justices of the said gaol shall appoint, the actual expenses incurred by the said keeper in any removal of such prisoner to or from the said gaol of Newgate, and also the actual expenses incurred in the maintenance, safe custody, and punishment of such prisoner, according to the time for which he shall have been in custody there, at the average daily cost of each prisoner, according to the whole number of prisoners confined in the said gaol, such average to be taken yearly, half-yearly, quarterly, or at such other intervals as the visiting justices of the said gaol shall from time to time determine, including in such expenses all salaries of officers, all expenses of repairs, alterations, additions, and improvements in or to the said gaol, all sums paid to prisoners under any Act of Parliament on their discharge or otherwise, and any other charges whatsoever on account of the prisoners confined in such gaol, subject, nevertheless, to a proportional share of all deductions on account of the earnings of the prisoners in the said gaol, and of all sums of money received in aid of the rates for the maintenance of such prison.

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Offences Act.*

The treasurer of the county where the offence was committed shall pay the expenses of the prisoner's maintenance, &c. in Newgate.

XXVIII. An account in writing of the expenses due and payable in respect of the maintenance, safe custody, care, and punishment of such prisoner as in the last preceding section mentioned shall be made out from time to time and signed by the clerk to the visiting justices of the said gaol of Newgate, and delivered to the treasurer of the county or place in which the offence wherewith such prisoner shall be charged shall have been committed or supposed to have been committed, and such account shall be conclusive against such county or place, unless some objection thereto shall be made in writing and signed by the treasurer of such county or place, and delivered to the clerk of such visiting justices within one calendar month after such account shall have been delivered to such treasurer.

An account of the expenses of any prisoner shall be delivered to the treasurer of the county where the offence was committed.

XXIX. Nothing in this act contained shall be deemed to apply to any indictment or inquisition charging any peer or peeress, or other person claiming the privilege of peerage, with any offence not now lawfully triable by any Court of Oyer and Terminer and Gaol Delivery for any county.

Act not to affect any peer or peeress.

SCHEDULE (A.)

To the Keeper of the Gaol of Newgate, and to the Keeper of the Gaol [House of Correction] at in the County of

Central Criminal Court } WHEREAS at a Session of the Central Criminal Court holden on (to wit.) the day of in the year of our Lord 18 , [prisoner's name] was convicted of [here state shortly the offence], and was thereupon sentenced by the said Central Criminal Court to be [here state the sentence, including the county or place where it is directed to be executed]:

These are therefore in Her Majesty's name to command you the said Keeper of the said Gaol of Newgate forthwith to cause the said [prisoner's name] to be delivered into the custody of the said Keeper of the said Gaol [House of Correction] at in the said County of , together with this Order, and also to command you the said Keeper of the said last-

APPENDIX

19 Vict. c. 16. mentioned Gaol [House of Correction] to receive the said [prisoner's name] into your custody in the same Gaol [House of Correction], and there safely to keep him until the said sentence shall have been executed according to law, or until he shall be otherwise delivered by due course of law.

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Offences Act*

Given under the hands and seals of us, the undersigned Justices and Judges of the said Central Criminal Court.

A.B. (L.S.)

C.D. (L.S.)

SCHEDULE (B.)

To the Sheriff of the County of

Central Criminal Court } WHEREAS at a Session of the Central Criminal Court holden on
(to wit.) { the day of in the year our Lord 18 , [prisoner's
name] was convicted of [here state shortly the offence], and was thereupon sentenced by the
said Central Criminal Court to be [here state the sentence, including the county or place where
it is directed to be executed]: And whereas the said [prisoner's name] has been ordered to
be removed into your said county in order that the said sentence may there be executed upon
him:

These are therefore in Her Majesty's name to command you the said sheriff to execute the
said sentence upon the said [prisoner's name] within your said county, according to law.

Given under the hands and seals of the undersigned Justices and Judges of the said
Central Criminal Court.

A.B. (L.S.)

C.D. (L.S.)

MISCELLANEOUS PRECEDENTS.

No. VI.

Indictment for Forgery of certain entries in the Transfer Book of Stock of the Great Northern Railway Company—with count for Conspiracy.

CENTRAL Criminal Court, } The jurors for our Lady the Queen
to wit. } upon their oath present, that whereas
heretofore and before the committing of the offences hereinafter-men-
tioned a certain company was established, which said company was
called and known as the Great Northern Railway Company. And
whereas, at the time of the committing of the offence hereinafter next
mentioned, the said company was possessed of a general capital stock.
And whereas at the time last aforesaid the said company kept a book
called "The Register of Holders of Consolidated Stock," for the purpose
of entering therein the names of the several parties interested in the
stock of the said company, and also for the purpose of entering in the
said book the amount of the interest in the said stock possessed by each
person respectively. And whereas at the time last aforesaid one L. R.
and one C. J. C. K. were employed by the said company to make entries
in the said book. And whereas it thereby became and was the duty of
the said L. R. and C. J. C. K. well and truly to make entries. And
whereas in the said book there was an entry of the name of the said
L. R. as a person interested in the said capital stock of the said company.
And whereas there was a certain entry in the said book whereby it was
signified that the said L. R. had become possessed of a certain amount,
to wit, the amount of one hundred and twenty-five pounds of certain
stock of the said company, called and known as "A. Deferred Stock."
And whereas by the said entry it was further signified that the said
L. R. had become possessed of the same by a certain deed of transfer
numbered with certain figures, that is to say, 8431. And whereas the
amount of the said stock of which the said L. R. had become possessed,
by means of the said deed of transfer, was signified in the said entry by
certain figures, that is to say, 125. Now the jurors aforesaid, upon their
oath aforesaid, do further present that the said L. R. and C. J. C. K.,
well knowing the premises, but being evil disposed and dishonest per-
sons, and contriving and intending to defraud on the day of _____,
in the year of our Lord one thousand eight hundred and fifty-six, in the
parish of _____, in the county of Middlesex, and within the jurisdiction
of the Central Criminal Court, unlawfully, knowingly and fraudulently
did falsely make, forge, and add the figure 1 to and before the said
figures 125, whereby was signified the amount of stock whereof the said
L. R. became possessed by the said deed of transfer numbered 8431;
but by reason and means of the said forgery and addition, the said figures
125 together with the said figure 1 so unlawfully forged and added as afore-
said, became an entry signifying that the amount of stock whereof the

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forgery of
certain entries
in the transfer
book of stock
of the Great
Northern
Railway
Company, with
count for
conspiracy.

said L. R. had become possessed by means of the said deed of transfer numbered 8431, was one thousand one hundred and twenty-five pounds, with intent to defraud, against the peace of our Lady the Queen, her crown and dignity.

Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said L. R. and C. J. C. K. on the day of , in the year of our Lord one thousand eight hundred and fifty- , at the parish of , in the county of Middlesex, and within the jurisdiction of the Central Criminal Court, unlawfully, fraudulently and knowingly did utter and publish a certain false, forged and fraudulent entry in a certain book kept by the Great Northern Railway Company, called “the Register of Holders of Consolidated Stock,” which said false, forged and fraudulent entry is as follows, 1125; which said false, forged and fraudulent entry signified that the said L. R. had become possessed of one thousand one hundred and twenty-five pounds, A. Deferred Stock in the said Great Northern Railway Company, by a certain deed of transfer numbered with certain figures, that is to say, with the figures 8431, with intent to defraud, they the said L. R. and C. J. C. K. well knowing the said false, forged and fraudulent entry to be false, forged and fraudulent, at the time they so uttered and published the same, against the peace of our Lady the Queen, her crown and dignity.

Third count.—And the said jurors aforesaid, upon their oath aforesaid, do further present, that whereas heretofore and before and at the time of the committing of the offence in this count mentioned, the said Great Northern Railway Company was so established as in the first count mentioned, and was possessed of the said stock in the first count mentioned, and was also possessed of the said book entitled “the Register of Holders of Consolidated Stock.” And whereas in the said book there was an entry of the name of the said L. R. as a person interested in the said stock of the said company. And whereas there was a certain entry in the said book, whereby it was signified that the said L. R. had become possessed of a certain amount of stock, to wit, the amount of two hundred and twelve pounds ten shillings of certain stock of the said company, called and known as “A Deferred Stock.” And whereas, by the said entry, it was further signified that the said L. R. had become possessed of the same by a certain deed of transfer numbered with certain figures, that is to say, with the figures 8451. And whereas the amount of the said stock of which the said L. R. had become possessed by means of the said last mentioned deed of transfer was signified in the said entry by certain figures, that is to say, by the figures 212 10. Now the jurors aforesaid, upon their oath aforesaid, do further present, that the said L. R. and C. J. C. K. well knowing the premises, but being such evil disposed persons as aforesaid, afterwards, to wit, on the day and year first mentioned, and at the parish and in the county aforesaid, and within the jurisdiction of the Central Criminal Court, unlawfully, knowingly and fraudulently did falsely make and forge the figure 1 to and before the said figures 212 10, whereby was signified the amount of stock whereof the said L. R. became possessed by the said deed of transfer numbered 8451. but by reason and means of the said forgery and addition, the said figures 212 10, together with the said figure 1 so unlawfully forged and added as aforesaid, became an entry signifying that the amount of stock whereof the said L. R. had become possessed by means of the said deed of transfer numbered with the

figures 8451, was one thousand two hundred and twelve pounds ten shillings, with intent to defraud, against the peace of our Lady the Queen, her crown and dignity.

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Fourth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said L. R. and C. J. C. K. being in possession of a certain false, forged and fraudulent entry, which said entry is as follows : that is to say, 212 10 in the said book called “the Register of Holders of Consolidated Stock,” on the day and year aforesaid, in the parish and county aforesaid, and within the jurisdiction of the Central Criminal Court, unlawfully, fraudulently and knowingly did utter and publish the said false, forged and fraudulent entry, well knowing the same to be forged with intent to defraud, against the peace of our Lady the Queen, her crown and dignity.

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forgery of
certain entries
in the transfer
book of stock
of the Great
Northern
Railway
Company, with
intent for
conspiracy.

Thirteenth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore and before the committing of the offence in this count mentioned, the said Great Northern Railway Company kept certain books for the purpose of causing entries to be made therein of every transfer, whereby any holder of stock in the said Great Northern Railway company might transfer his interest in the said stock to any other person. And whereas the said Great Northern Railway Company kept a certain book called “the Register of Holders of Consolidated Stock,” for the purpose of causing the names of the several parties interested in the said stock with the amount of the interest possessed by them respectively to be entered therein. And whereas by a certain deed of transfer made between J. A. of the one part, and the said L. R. hereinbefore mentioned of the other part ; the said J. A. on the twenty-first day of April, 1853, bargained, sold, assigned and transferred to the said L. R. one hundred and twenty-five pounds Consolidated A. Stock of and in the undertaking called the Great Northern Railway Company. And whereas an entry of the said transfer was made in the said book of the said Great Northern Railway Company. And whereas in a certain page of the said book called “the Register of Holders of Consolidated Stock,” there was an entry of the name of the said L. R., gentleman, 27, Chester Terrace, Regent’s Park, immediately under a certain other entry, which said other entry is as follows : name, address, and description, thereby meaning that the said L. R. hereinbefore mentioned, had become possessed of stock in the Great Northern Railway Company, by means of the deeds of transfer, the numbers whereof were placed next against the name of the said L. R. in the said entry. And whereas the said deed of transfer hereinbefore mentioned was numbered with certain figures, which said figures are as follows, 8431. And whereas opposite the said figures 8431 in the said page of the said book, there was a certain other entry in figures, that is to say, 125. And whereas the said entry of figures 125 was under another certain entry in the said page of the said book, which said entry is as follows : “A. Deferred.” And whereas the said entry “A. Deferred” is under a certain other entry which said other entry is as follows : “Stock Registered” in the said page in the said book. And whereas the said figures 125 under the said two last mentioned entries and opposite to the said figures 8431 next against the name of the said L. R., signified and imported that the said deed of transfer so numbered with the figures 8431 as aforesaid, had transferred to the said L. R. one hundred and twenty-five pounds Consolidated A. Stock in the said Great Northern Railway Company. Now the jurors aforesaid, upon their oath aforesaid, do further present, that

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the said L. R. and the said C. J. C. K., well knowing the premises, on the day and in the year first aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the Central Criminal Court, falsely, fraudulently and unlawfully did forge and add the figure 1 to the said figures 125, which said figure 1 so falsely forged and added as aforesaid, together with the said figures 125, then became an entry signifying that the said deed of transfer, so numbered with the figures 8431 as aforesaid, had transferred to the said L. R. one thousand one hundred and twenty-five pounds A. Deferred Stock in the said Great Northern Railway Company, with intent thereby then to defraud, against the peace of our Lady the Queen, her crown and dignity.

Fourteenth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said L. R. and C. J. C. K. on the day and year first aforesaid, and in the parish and county aforesaid, and within the jurisdiction of the Central Criminal Court, fraudulently, falsely, knowingly and unlawfully did utter and publish a certain entry in a certain book kept by the said Great Northern Railway Company, and called “the Register of Holders of Consolidated Stock,” which said false, fraudulent and forged entry purported to be an entry to a certain deed of transfer numbered with certain figures, that is to say, with the figures 8431, which had transferred to the said L. R. one thousand one hundred and twenty-five pounds Consolidated A. Stock in the said Great Northern Railway Company, with intent to defraud, they the said L. R. and C. J. C. K. well knowing the same to be forged at the time they so uttered and published the same, against the peace of our Lady the Queen, her crown and dignity.

Twenty-fifth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that whereas the said L. R. by a certain deed of transfer numbered with certain figures, that is to say, with the figures 11,668, and made between the said L. R. of the one part, and A. McN. of the other part, bargained, sold, assigned, and transferred to the said A. McN. five thousand pounds Consolidated A. Stock of and in the said Great Northern Railway Company, and whereas an entry of the said transfer was made in the books of the said Great Northern Railway Company. And whereas there was a certain page of the said book called “the Register of Holders of Consolidated Stock,” whereon was written an account showing how many transfers had been made by the said L. R. of Consolidated A. Stock, together with the numbers of the said transfers, and together with the amounts of stock assigned and transferred by the said deeds of transfer so numbered. And whereas, in the said page of the said book, there was a certain entry forming part of the said account, showing how many transfers had been made by the said L. R., which said entry is as follows, that is to say, 11,668, thereby meaning the said deed of transfer between the said L. R. and the said A. McN. in this count mentioned, so numbered with the figures 11,668 as aforesaid; and whereas, opposite to the said entry 11,668, there was a certain other entry, which said entry is as follows, that is to say, 5,000, thereby meaning five thousand pounds, and whereas the said entry 5,000 was under a certain other entry, which said entry is as follows that is to say, “A. Deferred,” thereby meaning a certain kind of stock in the Great Northern Railway Company called “A. Deferred Consolidated Stock.” And whereas the said entry A. Deferred was under a certain other entry in the said page of the said book, which said last-mentioned entry is as follows, that is to say, Stock Transferred, by which

said several entries it was signified that the said C. R. had transferred to some other person five thousand pounds A. Deferred Stock in the said Great Northern Railway Company, by means of the said deed of transfer numbered with the said figures 11,668. Now the jurors aforesaid, upon their oath aforesaid, do further present, that the said L. R. and C. J. C. K. on the day of , in the year of our Lord, 1853, at the parish and in the county aforesaid, within the jurisdiction of the Central Criminal Court, well knowing the premises, falsely, fraudulently, and knowingly did obliterate and efface the figure 5, part of the said entry 5,000, and did then and there falsely forge and make upon the place of the said figure 5 the figure 1, whereby and by means of the said forged and false alteration, the said false and forged entry became an entry signifying that the said L. R. had transferred the sum of one thousand pounds Consolidated A. Stock, and not five thousand pounds Consolidated A. Stock, with intent to defraud, against the peace of our Sovereign Lady the Queen, her crown and dignity.

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Indictment for forgery of certain entries in the transfer book of stock of the Great Northern Railway Company, with count for conspiracy.

Twenty-ninth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that whereas heretofore and at the time of the committing the offence in this count mentioned, to wit, on the day of in the year of our Lord one thousand eight hundred and fifty , the said L. R. hereinbefore mentioned, had transferred all the Consolidated Stock in the Great Northern Railway Company that the said L. R. had ever held in his own name. And whereas, at the time last aforesaid, he was not possessed of any Consolidated Stock whatever in the said Great Northern Railway Company, whereon he was entitled to receive dividend in the name of L. R. Now the jurors aforesaid, upon their oath aforesaid, do further present, that the said L. R. and C. J. C. K. well knowing the premises, but contriving and intending to cheat and defraud the said Great Northern Railway Company of their moneys, unlawfully, knowingly, and deceitfully on the day and in the year last aforesaid, at the parish and in the county aforesaid, and within the jurisdiction of the Central Criminal Court, did falsely pretend that he was possessed of one thousand six hundred and twenty-five pounds Consolidated Stock in the said Great Northern Railway Company, whereas, in truth and in fact, the said L. R. was not then possessed of the said one thousand six hundred and twenty-five pounds Consolidated Stock or any part thereof, as they the said L. R. and C. J. C. K. at the time they so falsely pretended as aforesaid well knew, by means of which such false pretences, they the said L. R. and C. J. C. K. on the day and in the year last aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully, fraudulently, and knowingly did obtain of and from the Great Northern Railway Company, a certain dividend-warrant, or order for the payment of money, to wit, for the payment of twenty-two pounds nineteen shillings and three halfpennies, of great value, to wit, of the value of twenty-two pounds nineteen shillings and three halfpennies in money, of the goods, chattels, moneys, and securities of the said Great Northern Railway Company, with intent to cheat and defraud the Great Northern Railway Company of the same, against the form of the statute in that case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Thirtieth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said L. R. and C. J. C. K. being evil disposed persons, and contriving and wickedly intending to cheat and

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defraud the said Great Northern Railway Company of their moneys, on the day and in the year first aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the Central Criminal Court, did conspire, combine, confederate and agree together to cheat and defraud the said Great Northern Railway Company of their moneys.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said L. R. and C. J. C. K. in pursuance of and according to the said conspiracy, combination, confederacy, and agreement between them as aforesaid, had on the day and in the year first aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, did write and enter, and cause, and procure to be written and entered, divers false and fraudulent entries in a certain book of the said Great Northern Railway Company, called "the Register of Holders of Consolidated Stock."

And the jurors aforesaid, upon their oath aforesaid, do further present, that in further pursuance of the said conspiracy, confederacy, combination, and agreement between them the said L. R. and C. J. C. K. as aforesaid, had on the day and year first aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, did falsely and fraudulently forge and alter, and cause and procure to be forged and altered, divers other entries in the said book called "the Register of Holders of Consolidated Stock."

And the jurors aforesaid, upon their oath aforesaid, do further present, that in further pursuance of the said conspiracy, combination, confederacy, and agreement between them the said L. R. and C. J. C. K. as aforesaid, had on the day of in the year of our Lord one thousand eight hundred and fifty-three, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, fraudulently, falsely, and knowingly did falsely pretend to the said Great Northern Railway Company, that the said L. R. was possessed of certain stock, held in his own name to the amount of one thousand six hundred and twenty-five pounds, and that by reason thereof he was entitled to receive a certain amount of money as dividend upon the same. Whereas, in truth and in fact, the said L. R. was not at the time the said L. R. and C. J. C. K. so falsely pretended as last aforesaid, possessed of the said amount of stock in his own name. And whereas the said L. R. was not entitled by reason thereof to receive the said sum of money, or any sum of money as dividend upon the same, as they the said L. R. and C. J. C. K. at the time they so falsely pretended as aforesaid well knew, by means of which said several false pretences, they the said L. R. and C. J. C. K. on the day and in the year last aforesaid, at the parish and in the county aforesaid, and within the jurisdiction of the Central Criminal Court, did obtain of and from the said Great Northern Railway Company a certain dividend-warrant of great value, to wit, of the value of twenty-two pounds, a certain order for the payment of money of great value, to wit, of the value of twenty-two pounds, one piece of paper of the value of one penny, twenty-two pounds nineteen shillings in money, of the goods, chattels, moneys and securities of the said Great Northern Railway Company, with intent to cheat and defraud the said Great Northern Railway Company of the same, against the peace of our Lady the Queen, her crown and dignity.

No. VII.

Indictment against the Master of a Workhouse for disposing of the dead body of a pauper for the purpose of dissection, contrary to the provisions of the Anatomy Act, 2 & 3 Will. 4, c. 75—with counts at Common Law.(a)

CENTRAL Criminal Court, } The jurors for our Lady the Queen
to wit. } upon their oath present, that heretofore and before and at the time of the committing of the offence herein-after next mentioned, A. F., hereinafter mentioned, was the master of a certain workhouse for the reception of poor indigent and impotent persons, under the laws in force relating to such persons, to wit, the workhouse of the parish of Saint Mary Newington in the county of Surrey, and as such master of the said workhouse was then and there charged with the superintendence, care, and management of the poor and indigent persons resident within the same, and the jurors aforesaid, upon their oath aforesaid, do further present that whilst the said A. F. was such master as aforesaid, and so charged as aforesaid, to wit, on the 30th day of January, A. D. 1857, one M. W., a poor indigent and impotent person, unable to provide for or maintain herself, was kept and maintained in the aforesaid workhouse, under the said superintendence and management of the said A. F.; and then, to wit, on the said 30th day of January, in the year aforesaid, departed this life in the said workhouse; whereupon the said A. F., as such master as aforesaid, became and was charged and intrusted with the dead body of the said M. W. for the purpose of interment, and not otherwise; and the said A. F., according to his duty as master of the said workhouse in that behalf, ought then and there, subject to the directions of the governors and guardians of the poor of the said parish, to have seen to, and provided for, the decent interment of the said body without improper delay, and without such delay to have caused the same to be buried in the proper burial-ground of the said parish appointed for that purpose, to wit, a certain burial-ground called the Victoria-park Cemetery. And the jurors aforesaid, upon their oath aforesaid, do further present that the said A. F., not regarding his duty in that behalf, then and there, to wit, on the day and year aforesaid, and from thence hitherto, unlawfully and designedly, did altogether omit to provide for the decent interment of the said body without delay, and without delay to cause the said body to be buried, and on the contrary thereof, to wit, on the 2nd day of February, in the year aforesaid, and whilst he was such master, and so charged and intrusted as aforesaid, unlawfully, wrongfully, indecently, and for corrupt lucre and gain to himself in that behalf, at the parish of St. Mary, Newington, in the county of Surrey, and within the jurisdiction of the said Central Criminal Court, did deliver and cause to be delivered, to wit, to one R. H., the said dead body, to take and carry away the same from the

(a) The case itself is reported in vol. viii. p. 18.

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workhouse aforesaid, to a certain hospital called Guy's Hospital, in order and for the purpose of the said body being there dissected and anatomized, without any lawful authority, license, or consent for such dissection and anatomy. And the said A. F. then and there, and by the means aforesaid, unlawfully, knowingly, and indecently did delay, hinder, and altogether prevent the burial and interment of the said dead body for a long, unreasonable, and improper space of time, to wit, from thence hitherto, in great contempt of our said Lady the Queen and her laws, to the great scandal of Christian burial, and against the peace of our said Lady the Queen, her crown and dignity.

Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present that heretofore, and before and at the time of the committing of the offence hereinafter next mentioned, the said A. F. was the master of a certain workhouse for the reception of poor indigent and impotent persons, under the laws relating to the poor in England, to wit, the workhouse of the parish of St. Mary, Newington, in the county of Surrey, and as such master of the said workhouse, was then and there from time to time charged with the superintendence, care, and management of the poor and indigent persons resident within the same; and the jurors aforesaid, upon their oath aforesaid, do further present that whilst the said A. F. was such master as aforesaid, and so charged aforesaid, to wit, on the 30th day of January, A. D. 1857, one M. W., a poor indigent and impotent person, unable to provide for or maintain herself, was kept and maintained in the aforesaid workhouse, under the said superintendence, care, and management of the said A. F.; and then, to wit, on the said 30th day of January, in the year aforesaid, departed this life in the said workhouse, whereupon the said A. F., as such master as aforesaid, became and was charged and intrusted with the dead body of the said M. W. for the purpose of interment, and not otherwise; and the said A. F., according to his duty as master of the said workhouse in that behalf, ought then and there, subject to the directions of the governors and guardians of the poor of the said parish, to have seen to, and provided for, the decent interment of the said body without any improper delay, and without such delay to have caused the same to be buried in the proper burial-ground of the said parish appointed for that purpose, to wit, a certain burial-ground, called the Victoria-park Cemetery. And the jurors aforesaid, upon their oath aforesaid, do further present that the said A. F., not regarding his duty in that behalf, then and there, to wit, on the day and year last aforesaid, and from thence hitherto, unlawfully and designedly, did altogether fail and omit to provide for the decent interment of the said body without delay, and without delay to cause the said body to be buried, and on the contrary thereof, to wit, on the 2nd day of February, in the year aforesaid, and whilst he was such master and so charged and intrusted as aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, wrongfully, knowingly, indecently, and designedly, did deliver and cause to be delivered, to wit, to one R. H., the said body, to take and carry away the same from the workhouse aforesaid to a certain hospital, called Guy's Hospital, in order and for the purpose of the said body being there dissected and anatomized, without any lawful authority, license, or consent for such dissection and anatomy; and the said A. F. then and there, and by the means aforesaid, unlawfully, knowingly, indecently, and designedly did delay, hinder, and altogether prevent the burial and interment of the said body for a long, unreasonable, and improper space

of time, to wit, from thence hitherto, in great contempt of our said Lady the Queen, her crown and dignity.

Third count.—And the jurors aforesaid, upon their oath aforesaid, do further present that heretofore and at the time of the commission of the offence hereinafter next mentioned, the said A. F. was charged and intrusted with the said dead body of one M. W. in order to provide for the decent burial and interment thereof, and not otherwise, and being so charged and incusted therewith, to wit, on the 2nd day of February, A. D. 1857, at the parish of St. Mary, Newington, in the County of Surrey, and within the jurisdiction of the said Central Criminal Court, unlawfully, wrongfully, indecently, designedly, and for corrupt lucre and gain to himself in that behalf, did deliver, and cause to be delivered, to wit, to one R. H., the said dead body to take and carry away the same from the workhouse of the said parish to a certain hospital called Guy's Hospital, in order and for the purpose of the said body being there dissected and anatomized without any lawful authority, license, or consent for such dissection and anatomy, in great contempt of our said Lady the Queen and her laws, to the great scandal of Christian burial, and against the peace of our said Lady the Queen, her crown and dignity.

Fourth count.—And the jurors aforesaid, upon their oath aforesaid, do further present that heretofore and during all the time in this count mentioned, the said A. F. was charged and entrusted with the dead body of one M. W. in order to provide for the decent burial and interment thereof and not otherwise, and being so charged and intrusted therewith, to wit, on the day and year last aforesaid, as well at the parish of St. Mary, Newington, aforesaid as at the parish of St. Thomas, Southwark, in the county aforesaid, and within the jurisdiction of the said court, for a long space of time afterwards, to wit, from thence hitherto, unlawfully, wrongfully, indecently, designedly, and for corrupt lucre and gain to himself in that behalf, did delay, hinder, and altogether prevent the burial and interment of the said body, with the view, object, and intent that the said body, during the said time, should be dissected and anatomized without any lawful authority, license, or consent for such dissection and anatomy, and for such lucre and gain as aforesaid, without such lawful authority, license, or consent as aforesaid, during the time aforesaid, unlawfully, indecently, and designedly did cause the said body to be so dissected and anatomized, to wit, at the said hospital, called Guy's Hospital, in great contempt of our said Lady the Queen and her laws, to the great scandal of Christian burial, and against the peace of our said Lady the Queen, her crown and dignity.

Fifth count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said A. F. on the said 2nd day of February, A. D. 1857, at the parish of St. Mary, Newington, aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully, wrongfully, indecently, and for corrupt lucre and gain to himself in that behalf, did take away and remove, and cause to be taken away and removed from a certain workhouse for the poor of the said parish of St. Mary, Newington, the dead body of one M. W. who had then lately died in the said workhouse, with the unlawful purpose, view, and intention of delaying the burial and interment of the said body for a long, unreasonable, and improper space of time, and that during such time the said body should be dissected and anatomized without any lawful authority, license, or consent for such dissection and anatomy, in contempt of our said Lady the Queen and

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her laws, to the great scandal of Christian burial, and against the peace of our said Lady the Queen, her crown and dignity.

Sixth count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said A. F. heretofore, to wit, on the day and year last aforesaid, at the parish of St. Mary, Newington, aforesaid, in the county of Surrey aforesaid, and within the jurisdiction of the said court, unlawfully, wrongfully, indecently, and for lucre and gain to himself in that behalf, did take away and remove, and caused to be taken away and removed from the said workhouse the dead body of one M. W. who had lately died in the said workhouse with intent to sell and dispose thereof, to wit, to divers persons to the jurors aforesaid unknown, for the purpose of being dissected and anatomized, without any lawful authority, license, or consent for such dissection and anatomy, in contempt of our said Lady the Queen and her laws, to the great scandal of Christian burial, and against the peace of our said Lady the Queen, her crown and dignity.

Seventh count.—And the jurors aforesaid, upon their oath aforesaid, do further present that heretofore and at the time of the committing of the offence next hereinafter mentioned, the dead body of one M. W., then lately deceased, was in the lawful possession, custody, and keeping of the governors and guardians of the poor of the parish of St. Mary, Newington, in the county of Surrey, to wit, in the workhouse for the said poor of the said parish there situate, for the purpose of being buried and interred in a certain burial-ground, to wit, a cemetery called the Victoria-park Cemetery. And the jurors aforesaid, upon their oath aforesaid, do further present that the said A. F., well knowing the premises, on the 2nd day of February, 1857, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully, wilfully, and irreverently, against the will and consent of the said governors and guardians, and without any lawful authority, license, and consent for so doing, unlawfully did steal, take, and carry away the said body from the possession, custody, and keeping of the said governors and guardians for the purpose of subjecting the said body to dissection and anatomy, contrary to law, in contempt of our said Lady the Queen and her laws, to the great scandal of Christian burial, and against the peace of our said Lady the Queen, her crown and dignity.

Eighth count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said A. F. on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, the dead body of one M. W., lately before deceased, unlawfully, wilfully, and indecently did sell and dispose of for gain and profit, in contempt of our said Lady the Queen and her laws, to the great scandal of Christian burial, and against the peace of our said Lady the Queen, her crown and dignity.

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ASSAULT.

If the jury find that the prosecutrix was a consenting party to indecent liberties taken by the prisoner, he cannot be convicted of an assault.

The prisoner was indicted for assaulting and attempting to have carnal knowledge of a girl between the ages of ten and twelve years. When the case for the Crown closed, counsel for the prisoner called upon the judge to leave a question to the jury as to the prosecutrix consenting to the acts complained of, to tell them, if they thought she had consented, to acquit the prisoner, which his Lordship declined to do, but told the jury that if they believed the evidence for the prosecution they should convict the prisoner:

Held, a misdirection, and that the prisoner, who had been convicted, should be discharged, and the conviction quashed. *Reg. v. William Mchegan*, 145.

If a constable sees an assault committed, he may recently after that assault, and before all danger of further violence has ceased, apprehend the offender; and if in so doing he is resisted and assaulted, the person assaulting is liable to be convicted of assaulting a constable in the execution of his duty. *Reg. v. Light*, 389.

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AUTREFOIS ACQUIT.

Upon the trial of an indictment for larceny, it appeared that the goods were stolen from a stall in a market at a time when the owner of the stall had left it temporarily in charge of his son, a boy of fourteen years old, who lived with his father and worked for him. The property was laid in the son, and on that account an acquittal was directed, and another bill, laying the property in the father, found by the grand jury:

Held, that a plea of autrefois acquit to that

second indictment could not be sustained.
Reg. v. Green, 186

BANKER.

In criminal cases a defendant cannot plead a special plea in addition to the general issue.

Semble, under the 7 & 8 Geo. 4, c. 29, s. 52, a disclosure of any illegal act to which the statute relates must, to be rendered available as a protection, be made *bonâ fide*, and must not be a mere voluntary statement made for the express purpose of screening the person making it from the consequences of his acts. *Re Strahan, Paul, and Butes*, 85

BANKRUPT.

Admissibility of compulsory examination of, 226

Upon the trial of an indictment against bankrupts under the 12 & 13 Vict. c. 106, s. 251, for embezzling part of their personal estate to the value of 10*l.*, to wit, bank notes and moneys, it appeared that the adjudication took place on the 21st June. Four days previously, viz., on the 17th, the bankrupts received several bank notes, and on the same day they crossed over to Belgium, where they remained for a considerable time. Some of these identical notes were afterwards received by mercantile houses in London from places in Belgium, to which the bankrupts were traced, but there was no evidence as to how or where the notes were dealt with by them from the moment of their receiving them. In their possession, when they were apprehended, was found a memorandum-book, purporting to be an account of their expenditure in Belgium, the items being stated in foreign coin. The bankrupts were followed to England, and there arrested, and when before the Bankruptcy Court, they gave no account of the disposal of the notes in question:

Held, that there was no evidence of any offence committed within the realm, for that if the notes were changed in this country, such a disposal must have taken place on the 17th June, and, therefore, before the adjudication, and if disposed of abroad, that, as well as the disposal of the proceeds, was a complete offence there:

Held, also, that although a subsequent non-accounting was evidence of a fraudulent appropriation, it was not any part of the crime of embezzlement:

Held, also, that on the trial of such an indictment, no inference unfavourable to

the defendants ought to be drawn from the fact, that when before the Commissioner of Bankrupts, they refused to be examined on the ground that they might, by their answers, criminate themselves:

Held, also, that the word "moneys" in the indictment must be construed to mean English money, and would not include foreign coin:

Held, also, that the description of the money embezzled, although laid under a videlicet, was a material averment, and such as the court in its discretion would decline to amend.

Semble, per Alderson, B. The meaning of the words "personal estate to the value of 10*l.*" is 10*l.* in one sum, and that the disposal of several smaller sums at different times, amounting in the aggregate to a larger sum than 10*l.*, would not be an embezzlement within the statute. *Reg. v. Davison and Gordon*, 158

BANKRUPTCY.

Admissibility of bankrupt's examination, 139
12 & 13 Vict. c. 106.

Upon an indictment against one of two bankrupts against whom there was a joint adjudication for not surrendering pursuant to the 12 & 13 Vict. c. 106, the proceedings in bankruptcy, on being put in evidence, showed several alterations and interlineations. The papers were duly sealed with the registrar's seal:

Held, that in the absence of evidence as to when the alterations and interlineations were made, the presumption was that they were made in proper time, and that therefore the documents were admissible.

Where a petition in bankruptcy is assigned by ballot to a particular commissioner, it is no objection to the subsequent proceedings that they take place before another commissioner—each commissioner in the London district, while sitting as such, constituting a court.

The duplicate adjudication was left at the counting-house of the bankrupts on the 21st of June, being their last-known place of business. The counting-house was then locked up on behalf of the assignees, and the paper was seen there a fortnight or three weeks afterwards. On the 26th of July, the counting-house was unlocked for the purpose of leaving there the summons to appear, and the place was locked up again. Before the trial the counting-house was searched, and neither of these papers was found. A proper notice to produce them was served upon the prisoners:

Held, that the search at the counting-house and the notice to produce were sufficient to render duplicate originals of both admissible.

The notice in the Gazette described the bankrupts as of West Ham Lane, in Middlesex, but the former proceedings described them as of West Ham Lane, in Essex :

Held, that the variance was not such as to invalidate the proceedings.

The Gazette required the surrender of the two bankrupts on two specified days. The summons to appear was not left at the bankrupt's place of business until the first of those days had expired :

Held, that the service of the summons was sufficient.

Upon the trial the jury found that the bankrupts left the kingdom before the bankruptcy, but believing that they should be made bankrupts, and that they stayed abroad with the intent to defraud their creditors by depriving them of their right to examine them ; but there was no evidence that the bankrupts had actual knowledge of the contents of the several documents in bankruptcy, or even of the bankruptcy itself :

Held, that the conviction was nevertheless valid.

November 30.—Before Campbell, C. J., Jervis, C. J., Parke, B., Alderson, B., Wightman, J., Cresswell, J., Erle, J., Platt, B., Crompton, J., and Willes, J.

Only one duplicate adjudication in bankruptcy against the bankrupts, and only one summons to surrender was served :

Held (Jervis, C. J., Erle, J., Platt, B., and Willes, J., *dissentientibus*), that the service was insufficient. *Reg. v. Gordon*, 19

On an indictment against a bankrupt under sect. 253 of 12 & 13 Vict. c. 106, for fraudulently obtaining goods on credit within three months of his bankruptcy, it is necessary for the prosecution to prove the act of bankruptcy and the other ingredients of the bankruptcy. Proof of the adjudication alone is insufficient.

The act of bankruptcy relied on was the filing of a petition by the bankrupt in the Insolvent Court, and a copy of the petition certified to be a true copy by the proper officer of the court, and made evidence of the petition by the 239th section, was held to be no evidence of the date of the filing of the petition, although on the back of the petition there was an indorsement purporting to state when the petition was filed. *Reg. v. Lands*, 89

BIGAMY.

A British subject, usually resident in England,

and contracting a second marriage in Scotland during the life of his wife, is liable to be convicted of bigamy in England under the provisions of 9 Geo. 4, c. 31, s. 22. *Reg. v. Topping*, 103

Upon a trial for bigamy, in which it appeared that the first husband had been continually absent from the prisoner for the space of seven years next preceding the second marriage, the jury, being asked to consider whether she knew her husband to be alive at the time of the second marriage, and if not, whether she had had the means of acquiring the knowledge, found that they had no evidence of her knowledge, but were of opinion that she had the means of acquiring knowledge if she had chosen to make use of them :

Held, that upon that finding the conviction could not be sustained, inasmuch as it left it uncertain whether, in fact, she had or had not the knowledge. *Reg. v. Mary Briggs*, 175

Upon a trial for bigamy, it was proved by a witness who was present, that the first marriage took place in a Wesleyan chapel in the presence of the registrar of the district ; and an examined copy of the entry in the register book of marriages, kept at the office of the superintendent registrar of the district, was also produced and proved. A document purporting to be a certificate by the superintendent registrar of the fact that the chapel had been duly registered, was also produced by a witness who stated that he saw the register book, and that it was correctly extracted :

Held, by Pollock, C. B., that the certificate so proved was admissible evidence of the fact of registration, as being an examined copy of an entry in the register ; and by the rest of the court, that even if that certificate was inadmissible, there was evidence of a valid marriage, as the court must presume, from the facts proved, that the chapel was duly registered. *Reg. v. Mainwaring*, 192

BURYING GROUND.

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CHEATING.

In an indictment under 8 & 9 Vict. c. 109, s. 7, for cheating at cards, it is not necessary to allege whose money is won :

Quære, whether under that statute it is necessary, to constitute the offence, that any money should be actually obtained. *Reg. v. Moss*, 200

COINING.

The mere possession of a large quantity of pieces of counterfeit coin, of the same date and make, each being wrapped up in a separate piece of paper, affords evidence for the jury both of guilty knowledge, and of an intention to utter. *Reg. v. Jervis*, 53

It is a misdemeanor at common law to make or procure dies, having engraved thereon the obverse and reverse sides of a foreign coin, with intent therewith to make such coin; for it is an act done with intent to commit and proximately connected with the commission of a statutable felony:

So, held, although it was found that a coining press and some other things, which the prisoner had not procured, were required for the completion of the felony; and that the prisoner only intended to make a few of the counterfeit coin in England by way of trying his apparatus. *Reg. v. Roberts*, 39

CONCEALMENT OF BIRTH.

Although the child be laid in such a position that it does not necessarily follow that concealment was intended, yet if the jury find that such was the intention of the mother, it would seem that the offence is complete.

The child, for concealing whose birth the mother was indicted, was found lying on the bed covered by the quilt merely, and lying near the wall by the side of which the bed was placed.

There was no further attempt at concealment:

Held, that if the jury, from the other circumstances of the case, should be of opinion that concealment was the intention of the mother, she should be convicted.

Reg. v. Jane Perry (1 Pierce & Dearsly, 471; S.C. Cox Crim. Cas. 531) be acted on. *Reg. v. Mary Gogarty*, 107.

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CONSPIRACY.

The directors of a joint stock bank, knowing it to be in a state of insolvency, issued a balance-sheet showing a profit, and thereupon declared a dividend of 6 per cent. They also issued advertisements inviting the public to take shares upon the faith of their representations that the bank was in a flourishing condition.

On an *ex officio* information filed by the

Attorney-General, they were found guilty of a conspiracy to defraud. *Reg. v. Brown and Others*, 442

CONVICTION.

On a return to a writ of *habeas corpus*, the gaoler returned two committals. The first was on a conviction under the Summary Jurisdiction Act (14 & 15 Vict. c. 92), dated the 21st May, and sentenced to two months' imprisonment, and to give bail to keep the peace for seven years; the second was on a conviction dated the 7th June, with a sentence of imprisonment for two months, and without the order to give bail. The period from which the time of imprisonment was to be computed was not stated in either:

Held, that the first conviction was bad, as being an excess of jurisdiction, as the magistrates in proceeding under the Summary Jurisdiction Act, were not justified in passing any sentence not warranted by the act.

That the second conviction was bad for uncertainty, as, if the time should be computed from the date of the warrant, the sentence would be in excess of the magistrates' jurisdiction, and there were no means of ascertaining otherwise what the period was.

A person proposing to exhibit articles of the peace, should be present in court when they are sworn and exhibited.

When articles of the peace have been exhibited against a person, the court will direct that he should be confined in the gaol of the neighbourhood where he resides, if he so desire, in order to enable him to obtain bail. *Reg. v. Woodside*, 238

COSTS.

In a case of manslaughter, the father of the deceased retained an attorney to prosecute the person charged. In pursuance of this retainer, the attorney prepared and delivered briefs to counsel at the assizes, with instructions to conduct the prosecution. A constable of the county police had been bound over by recognizance to prosecute, and the solicitor for the police, in pursuance of general orders given to him by the constabulary committee, prepared and delivered a brief to counsel:

Held, that the court had no power to order that the attorney who had been retained by the father should be allowed the costs of preparing briefs, &c. *Reg. v. Yates*, 361

COUNSEL.

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COUNTY COURT.

A document appearing on the face of it to be a mere notice by a plaintiff to a defendant to produce accounts on the trial of a cause, though headed "In the County Court of L.," and entitled as if in a cause in that court, does not "purport" to be any process of the County Court, and will not support an indictment so alleging it. *Reg. v. Castle*, 375

In order to convict a person of the offence of acting or professing to act under any false colour or pretence of the process of the County Court, under sect. 57 of 9 & 10 Vict. c. 95, it is not necessary to show that the document used bore any resemblance to the actual genuine process of that court; it is enough if he falsely and fraudulently pretends that process has issued, and that in what he does he is acting under such process.

When therefore A., in order to obtain payment of a debt, sent to B., his debtor, a letter, partly written and partly printed, having at the top of the page the letters V. R. and the royal arms, and containing notice to B. that if the debt was not paid "proceedings would be taken in pursuance of the provisions of the stat. 9 & 10 Vict. c. 95, the new County Court Act for the more easy Recovery of Small Debts;" which letter purported to be signed, "F. M., clerk to court, instructed by A.;" and afterwards represented to the wife of B. that he had ordered the court to send that letter, and then obtained payment of the debt, and made a claim of 1s. 3d. in addition for County Court expenses:

Held (Bramwell, B., *dissentiente*), that A. was properly convicted of acting and professing to act under false colour and pretence of the process of the County Court, although the letter which he sent bore no resemblance to a genuine County Court summons, or to any process of that court. *Reg. v. Evans*, 293

CRIMINAL INFORMATION.

Where a conditional order for liberty to file a criminal information for sending a letter provoking to fight a duel has been granted, although it might be good cause against making such order absolute, that the prosecutor, who had spoken injuriously of the defendant in addressing a jury had so spoken maliciously, and not *bonâ fide* in the discharge of his duty as counsel; yet, where the court is not satisfied that such injurious expressions of the prosecutor were irrelevant, malicious, and not *bonâ fide*, they will make absolute the order.

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Although the court may be of opinion that the observations of counsel, which provoked the sending such a letter, were privileged as being pertinent to the issue and not malicious, yet when such observations have been unusually harsh and irritating, it will, in making absolute the conditional order, put a stay upon the issuing of the information until further application. *Reg. on the Prosecution of Armstrong v. Kiernan*, 6

At a vestry meeting a resolution was adopted containing imputations of sacrilege and felony against the rector of the parish, in reference to the appropriation of stone balls belonging to the church. At a subsequent meeting, held in consequence of the rector having called for an explanation and apology, another resolution was passed to the effect that it was not intended by the former resolution to impute sacrilege and felony in a legal sense; that as the stone balls had been given back, no further proceedings should be taken, and the former resolution expunged. These resolutions were signed by S. as chairman. The rector did not personally attend the vestry on either occasion:

Held, that under these circumstances there was not sufficient ground for granting a rule for a criminal information against S., although the rector, by his affidavit, completely vindicated himself from any suspicion of improper conduct. *Ex parte Doveton*, 16

DYING DECLARATION.

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EMBEZZLEMENT.

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Upon the trial of an indictment against a person employed as storekeeper and clerk under the governor of a county gaol for embezzlement, it appeared that although it was no part of his regular duty to receive money, yet he was allowed by the justices to do so in the absence of the governor; and it was objected on his behalf, that he had not received the money by virtue of his employment, and that that was a question for the jury:

Held, that it was a question for the jury; and the judge having directed the jury that if they believed that the prisoner received the money, he did receive it by virtue of his employment, the conviction was wrong. *Reg. v. Harman*, 45

Upon the trial of an indictment under 2 Will. 4,

c. 4, s. 1, charging that A., being entrusted, by virtue of his employment in the public service, with the receipt and custody of certain money, the property of the Crown, did fraudulently and feloniously apply the same to his own use, it was proved that A., being a receiver of taxes, had kept in his own hands a balance very much exceeding that which he was allowed to retain; and upon being asked whether he was prepared to pay over that balance, or any part of it, he replied that he was not. He was then reminded that there was a balance of excise duties alone of about 300*l.* standing against him from the previous Monday, which was a receipt day at a particular place in his district. He then produced 255*l.*, and said that was all he had in the world; and that the rest he had spent in an unfortunate speculation:

Held, that upon these facts there was evidence of the receipt of a particular sum of 300*l.* by virtue of his employment, and of a misapplication by him of a part of it; and that in this case, therefore, the conviction was right, even if evidence of a general deficiency on a balance of accounts would not alone have supported such an indictment.

Quare, whether evidence of a general deficiency on a balance of accounts is sufficient to sustain an ordinary indictment for embezzlement under 7 & 8 Geo. 4, c. 29, s. 47. *Reg. v. John Moah*, 60

In an indictment for embezzlement by the clerk of a savings bank, the property was laid in A. B. and others. In order to prove that A. B. was a trustee he was called as a witness, and stated that since the commission of the offence he had been active as a trustee, but that before that date he had attended only one meeting, having been requested to do so lest there should be a deficiency of trustees; but he was also a manager, and it did not appear that any act was done at that meeting which might not have been done by a manager as well as by a trustee:

Held, insufficient evidence of acting to support the inference of a legal appointment as trustee.

Upon indictment for stealing a cheque, it was proved that the prisoner being clerk to a savings bank received a cheque from a manager, upon a false representation that one of the depositors had given notice of withdrawal, and for the purpose of handing it over to the depositor. It being found that according to the usual course of business, if a depositor could not attend at the proper time to receive the cheque, it was

handed to the prisoner as the agent of the depositor:

Held, that the case was one of false pretences, and not larceny. *Reg. v. Essex*, 384

A. was employed as a delivery clerk at a railway station belonging to four different companies, and maintained out of a joint fund. He was appointed and liable to be dismissed by a managing committee, composed of directors of the several companies. His duty was to deliver parcels which arrive at the station by the trains of the different companies, and to pay over the money which he received to the chief clerk of the parcels' office, by whom it was paid over to the cashier, who kept a separate account for each company, and paid over to each company the amount received for parcels carried by each. The chief clerk and cashier were appointed by the committee. Loss by negligence or embezzlement of a station servant was usually made good to the particular company out of the general station funds.

An indictment for embezzlement charged him in different counts as the servant of the one company, whose money he had embezzled; in another as the servant of the four companies; in a third as the servant of the committee; and in a fourth as the servant of the station manager:

Held, that at all events he was rightly charged as the servant of the four companies. *Reg. v. Bailey*, 179

On the trial of an indictment for embezzlement, it was proved that the prisoner's duty was to enter the money he received from his master's customers in various books, and pay the amount into a banker's. It was also his duty to enter the various accounts from these books into the ledger at his convenience. He received a sum of money from a customer, and omitted to enter it in any of the books except the ledger; in that book, however, it was entered to the customer's credit. Instead of paying the money into the bankers he appropriated it to his own use:

Held, that the entry in the ledger was not such an accounting as would prevent him being guilty of the crime of embezzlement.

Reg. v. Lister, 203

A. was employed as cashier by B. It was his duty to receive money, to enter it in a cash-book as coming from the customers by whom it was paid, and to keep safely for the use of his master so much as was not lawfully disbursed by him. He was not required to keep the moneys so received distinct in specie, but he was responsible for the aggre-

gate, forming one cash balance, allowing for his disbursements. Payments were made by customers to B. himself or to other persons in his employment, and the sums were handed over to A. either by B. or those other persons. On eight occasions A. had entered in his cash-book less than the amount actually received from the customer, and accounted for the difference by entering an allowance of discount to the customer larger than the amount actually allowed; but he credited the customer in the ledger with the correct amount. On several occasions, also, he had misadded his cash-book, so that the total of receipts at the foot of the page appeared less, and the total of disbursements more than it ought to have appeared. A deficiency to a considerable amount was shown upon a balance of his accounts. A. being indicted for larceny of money from his masters, was convicted of that offence; but upon a case reserved:

Held, that there was abundant evidence of embezzlement, but no evidence of larceny: and that although upon the indictment for larceny there might have been a conviction for embezzlement, under the 14 & 15 Vict. c. 100, s. 14, yet the conviction for larceny, not being warranted by the evidence, must be quashed. *Reg. v. Gorbett*, 221

ERROR.

Inconsistent verdict, *venire de novo*, 151

EVIDENCE.

Where a prisoner is indicted jointly with the prosecutor's wife, who had eloped with him, for stealing clothes and money, the property of the husband, the wife should be acquitted, as no indictment lies against her, but the husband's evidence is admissible against the male prisoner.

The fact that the wife's clothes (which are in point of law the property of the husband) are found in the trunk of a person with whom she has eloped, is evidence to go to the jury of an intention to appropriate such clothes, and if the jury find that the intention was to remove them out of the husband's control, and to keep them within the prisoner's disposal, the offence is complete. *Reg. v. Graham Glassie and Frances Cooney*, 1

The rule which requires the evidence of an accomplice to be corroborated is one of practice only, and although it is the practice of the judges to advise juries to disregard the evidence of such witnesses, so far as it implicates any prisoners against whom there is no other evidence, yet a different direction

is not incorrect in point of law: and where a chairman of quarter sessions told the jury that corroboration of the accomplice as to two out of three persons charged was sufficient, though his evidence as to the third person should be viewed with more suspicion, a conviction of all three was affirmed. *Reg. v. Stubbs and Others*, 48

Upon a trial for felony, it is no ground for receiving in evidence a deposition taken before the committing magistrate that the witness is a foreigner and absent in a foreign country. *Reg. v. Austen and Another*, 55

Statements made in the absence of the accused by persons engaged in an unlawful act are not evidence against the accused who had given directions for such act, unless it appear that all the parties were engaged on such act with a common unlawful object.

There is no rule which excludes the evidence of Crown witnesses who have not made informations.

Statements made by the accused not accompanying or connected with acts complained of can under no circumstances be given in evidence for him to show his intention.

The prisoner was indicted for wilfully and knowingly burning and causing to be burned certain authorized versions of the Holy Scriptures. The heap of books, amongst which it was alleged were the copies in question, was burned by direction of the traverser. It was proposed to give in evidence a statement (not in the prisoner's hearing) made by a boy who was one of a crowd round a fire, and was engaged in throwing books into the blaze. There was no evidence of this boy having been retained by the traverser, or of his having received any directions on the subject:

Held, that such statement was not admissible as part of the *res gesta*, and did not come within those classes of cases, as riots and conspiracies, in which such statements would be evidence, as it did not appear that the accused and the person whose statement was offered in evidence were engaged in an unlawful act with a common unlawful object.

A witness was called for the Crown who had not made an information, and it was sought by the prisoner's counsel to shut out such evidence on the ground of such information not having been made:

Held, there was no rule to admit such evidence under the circumstances.

The counsel for the prisoner sought to give in evidence statements and directions of the accused in sermons previous to the burning of the books in question, for the

purpose of showing that he had only called in immoral publications to be brought in to be burned :

Held, not admissible. *Reg. v. The Rev. Vladimir Petcherini*, 79

A voluntary statement made by a prisoner in the presence of a magistrate, upon an application for a remand, is admissible in evidence, though the statement was not taken down in writing, and no caution was given by the magistrate to the effect prescribed by 11 & 12 Vict. c. 42, s. 18. *Reg. v. Mary Anne Stripp*, 97

The examination of a bankrupt as to his trade dealing and effects, lawfully taken under sect. 117 of 12 & 13 Vict. c. 106, is admissible in evidence against him on a criminal charge arising out of the very matters as to which he was so examined :

So held, in a case where the bankrupt was tried with another for a conspiracy to defeat the remedies of the bankrupt's creditors by means of a judgment and execution, founded on a fictitious debt ; and where the bankrupt had been cross-examined in the Bankruptcy Court as to the concoction of that fraud. *Reg. v. Cross and Leyland*, 226

A bankrupt was examined before a commissioner under sect. 117 of the Bankrupt Act, and asked various questions respecting the writing of a false letter in his father's name for the purpose of getting additional credit from persons with whom he traded. He made no objection to answering the questions on the ground that they tended to criminate him, or on any other ground :

Held, that the examination was not compulsory under the 117th section of the Bankrupt Act, as touching the estate or dealings of the bankrupt ; and that, as he might have objected to it and did not, it was a voluntary statement, and admissible in evidence against him upon his trial subsequently on the criminal charge of uttering a forged letter. *Reg. v. Sloggett*, 139

The examination of a bankrupt in the Court of Bankruptcy, touching his trade, dealings and estate, is admissible in evidence against him upon a criminal charge, though the answers may have been extracted from him under threat of committal, and may be criminatory of himself. [Coleridge, J. dissentiente.] *Reg. v. Benjamin Scott*, 164

Upon the trial of an indictment for manslaughter, a statement made by the deceased respecting the manner in which, and the persons by whom, the injuries had been inflicted, was received in evidence. The statement concluded with these words :—" I have made this statement believing I shall not recover ;" and at that time he was

in such a state that his death must speedily follow ; and he died seven days afterwards. But it appeared also, that shortly before he made the declaration he had said to a constable, who asked him how he was :—" I have seen Mr. Booker, the surgeon to-day, and he has given me some little hope that I am better, but I do not myself think that I shall ultimately recover." Afterwards, on the same occasion, he said he could not recover :

Held, that there was sufficient evidence that the statement was made under a consciousness of impending death to justify its reception in evidence.

Per Martin, B.—The admissibility of the statement as a dying declaration depends upon whether the judge at the trial is satisfied that it was made under a sense of approaching death. *Reg. v. Wm. Reaney and Jas. Reddish*, 209

A prisoner, in custody, was interrogated with the following caution by an inspector of police : " You are accused of a very serious offence, have you any explanation to give ? You are not bound to say anything, but anything you do say will be given in evidence against you :"

Held, that the prisoner's answer should not be received in evidence :

Semble, that a judge should be slow to admit statements made by prisoners to persons holding them in custody, and that the admission of such evidence is contrary to the policy of the 11 & 12 Vict. c. 42. *Reg. v. Eliza Toole*, 244

It is competent to counsel on cross-examination to ask the witness if he had ever made a certain statement, without excepting from such question the time when he was before the magistrates. *Reg. v. Price and Others*, 405

Upon the trial of an indictment for robbery, the prosecutor himself being absent, the only evidence of his Christian name was this : that one of the witnesses had seen him sign the information against the prisoner, and also the deposition before the magistrates, and that the signatures to those documents corresponded with the names laid in the indictment :

Held, admissible and sufficient evidence of the Christian name. *Reg. v. Toole and Others*, 266

The deposition of a witness was received in evidence, upon proof being given by his medical attendant, that though he might have been brought to the court without danger to life, yet he was suffering from a second attack of paralysis, which disabled him altogether from giving evidence :

Held, rightly received. *Reg. v. Cockburn*, 265
 Statements made by a prisoner in an information with a view to his being examined as a witness for the Crown, are not admissible in evidence against the prisoner for the purpose of implicating him in the offence, the subject of the information. *Reg. v. M'Hugh*, 483
 Against bankrupt for not surrendering, intent to defraud, 19
 Of possession of counterfeit coin, 53
 Of embezzlement by receiver of trusts, 60
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 Of embezzlement by a bankrupt, 158
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 Of embezzlement by clerk, 179
 Of embezzlement, 221
 Of larceny, 221, 355, 384, 413
 In libel, 251
 Examining acquitted prisoner, 337
 Of death before taken in larceny, 379
 Of false pretences, 384
 Of forgery, 401

FALSE PRETENCES.

In answer to questions contained in the form of attestations for militia volunteers issued by the War Office, a recruit answered that he did not belong to, nor had been enrolled in, any other corps of militia, and that he did not belong to, nor had served in, Her Majesty's army; whereas, in truth, he had previously been enrolled in another corps of militia:

Held, that he could not be convicted upon an indictment framed under sect. 57 of the Mutiny Act (13 & 19 Vict. c. 11), as the forms in the schedule to that act contained no such question as had been put to the prisoner respecting his previous enrolment in the militia; and as his negative answer to the question whether he had served in the army, could not be considered wilfully false. *Reg. v. James Jessup*, 70

A letter containing a false pretence was received by the prosecutor through the post, in the borough of C.; but it was written and posted out of the borough. In consequence of that letter he transmitted through the post to the writer of the first a post-office order for 20*l.*, which was received out of the borough:

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Held, that in an indictment against the writer of the first letter for false pretences, the venue was well laid in the borough of C. *Reg. v. Leech*, 100

A false and fraudulent statement to a pawnbroker, that a chain offered as a pledge is silver, is indictable as a false pretence under the statute of 7 & 8 Geo. 4, c. 29, if money be thereby obtained; and upon the trial of such an indictment evidence is admissible of misrepresentations made by the prisoner to others about the same time, and of the possession by him of a considerable number of chains of the same kind.

If the false statement be made with intent to obtain money, but the prosecutor relies entirely upon his own examination of the chattel, and not at all upon the prisoner's statement, the latter cannot be convicted of the complete offence, but is guilty of an attempt to commit it. *Reg. v. Roebuck*, 126.

A. applied to B. for a loan, upon the security of a piece of land, and falsely and fraudulently represented that a house was built upon it. B. advanced the money, upon A. signing an agreement for a mortgage, depositing his lease, and executing a bond as collateral security:

Held, that A. was properly convicted of obtaining money by false pretences. *Reg. v. Burgon*, 131

A person, who, by falsely representing himself to fill a particular character, induces another to enter into a contract with him for board and lodging, and is supplied accordingly with various articles of food, cannot be convicted of obtaining goods by false pretences, the obtaining of the goods being too remotely connected with the false representation. *Reg. v. Gardener*, 136.

An indictment charged that the defendant knowingly falsely pretended that a horse was sound, and that he himself was a farmer at O., negating both pretences in the usual way. The defendant was convicted, but a case was reserved, in which, after stating that the false representations were made, and the money obtained as alleged, and that the defence was, that this was a case of giving a false warranty, and therefore not indictable, the question was put whether the conviction could be sustained. The court having directed an amendment of the case, the facts proved at the trial were set out more specifically; but it was not stated as a fact that the defendant knew the horse to be unsound, though evidence was stated from which that inference might be drawn; nor was it stated what direction the chairman had given to the jury:

Held, that as the case was framed, the
 i *

conviction must be quashed; as the court, not knowing what direction had been given to the jury, could not answer the question put to it in the affirmative: and, as it was consistent with the case that the jury might have been told that even if the defendant did not know that the horse was unsound, he might be convicted upon the other false statement alone. *Reg. v. Keighley*, 217

An indictment for obtaining money by false pretences cannot be sustained, if the prosecutor, when he parted with his money, knew the representation to be false. *Reg. v. Mills*, 263

On an indictment for false pretences, it was proved that prisoner, after having agreed with prosecutor to sell and deliver a load of coals at a certain price per cwt., falsely and fraudulently pretended that the quantity which he had delivered was 18 cwt., and that it had been weighed at the colliery, and the weight put down by himself on a ticket, which he produced, he knowing it to be 14 cwt. only, and thereby obtained an additional sum of money:

Held, to have been properly convicted.

Reg. v. Sherwood, 270

A. falsely represented to B. that a third person was baling up for him a quantity of leather which was to come into his warehouse that afternoon, and requested B. to purchase it at a price which he named. B. agreed to become a purchaser at that price, and thereupon A. asked B. to accept a bill for the amount of the purchase-money. B. consented; and A. shortly afterwards produced a bill of exchange duly stamped, signed by himself as drawer, payable to his own order, and addressed to B. This bill A. handed to B., who accepted it and returned it to A., by whom it was indorsed and discounted:

Held, that A. could not be convicted of obtaining from B. a valuable security by false pretences, as the instrument, whilst in B.'s hands, was of no value to him or to any one else, unless to the prisoner; and as B. had no property either in the instrument or the paper on which it was written. *Reg. v. Danger*, 303

A simple misrepresentation of the quality of goods is not a false pretence within the statute 7 & 8 Geo. 4, c. 29, s. 53, provided the goods are in specie that which they are represented to be.

In order to obtain an advance of money on a large quantity of plated spoons, the defendant represented to a pawnbroker that they were of the best quality, that they were equal to Elkington's A. (meaning spoons and forks made by Elkington, and stamped

by him with the letter A.), that the foundation was of the best material, and that they had as much silver upon them as Elkington's A. The jury found that these representations were wilfully false, and that by means of them an advance of money was made:

Held (*dissentientibus* Willes and Bramwell), that the conviction was wrong, and that the representation being a mere exaggeration or puffing of the quality of the goods in the course of a bargain, it was not a false pretence within the statute. *Reg. v. Bryan*, 312

Where the prisoner, in July, 1857, gave in exchange for the sum of 5*l.* a promissory note for the payment of 5*l.* of the Old Bank, Newport, Monmouthshire, and stated that the note was a good one, though in reality the Old Bank had stopped payment in the year 1851, as the prisoner well knew, it was held that he could not be convicted of obtaining the 5*l.* by false pretences. *Reg. v. Williams*, 351

Upon the trial of an indictment for obtaining money by false pretences, it was proved that the prosecutor, upon the faith of certain representations made to him by the prisoner, entered into a partnership with him, and advanced money as part of the capital of the firm:

Held, that under these circumstances, a conviction could not be sustained. *Reg. v. Watson*, 364

An indictment for false pretences charged that the prisoner did "unlawfully obtain from A. B. a cheque for the sum of 8*l.* 14*s.* 6*d.* of the moneys of C. D.:"

Held, that this averment sufficiently described the cheque to be the property of C. D. *Reg. v. Godfrey*, 392

Upon an indictment for obtaining money by false pretences, it appeared that the prisoner had told the prosecutrix that she kept a shop at a particular place, and that she might go home with her until she got a situation. She then borrowed 10*s.* of her, and promised to repay it when they got home; but having got the money she left the prosecutrix altogether. It was untrue that she kept a shop at the place named; and the prosecutrix stated that it was on the faith of that representation that she parted with the money. The jury found the prisoner guilty of fraudulently obtaining the half-sovereign, the prosecutrix parting with it under the belief that the prisoner kept a shop at the place mentioned, and that she should have the money when she went home with the prisoner:

Held, that the conviction was right. *Reg. v. Fry*, 395

A person who fraudulently offers a 1*l.* bank note as a note for 5*l.* and gets it changed upon that representation, may be convicted under the statute for obtaining money by false pretences, although the party to whom it was passed could read, and the note, upon the face of it, afforded clearly the means of detecting the fraud. *Reg. v. Jessop*, 399

A. having bought a watch in London, returned it to the seller to be regulated. B. fraudulently wrote in the name of A. to the seller, requesting him to send it in a letter to the post-office at C., and on its arrival at C. personated A. and received the watch:

Held, that B. was guilty, not of obtaining by false pretences, but of larceny. *Reg. v. Kay*, 289.

A collier placed certain "tallies" in a tub, whereby in the ordinary course of business the tallies would have been hung on a "tally-board," and he would have received payment as if for having raised as many tubs of coal as the tallies represented:

Held, that these facts were sufficient to constitute a complete attempt to obtain money by false pretences. *Reg. v. Thomas Rigby*, 507.

FELON.

Circumstances under which the court will make an order for restoration of the property stolen.

The practice of the Treasury is not to retain the property of a felon when any person makes out a good case for its restoration. Sometimes it is restored to the felon himself for good conduct, and sometimes to his wife. The Treasury always endeavours to act according to the equity of each case. *Reg. v. Pierce and others*, 206

FINDING.

Larceny by, 147.

FORGERY.

Notwithstanding the statute 14 & 15 Vict. c. 100, s. 8, which renders it unnecessary in an indictment for forgery to allege an intent to defraud any particular person, it is essential to a conviction that such an intent should be proved; and where a diploma of the College of Surgeons was altered by substituting one name for another and changing the date, and the person who altered it did so in order to induce a belief that he was a member of the college, but had no intent to commit any particular fraud or specific wrong to any individual:

Held, that he could not be properly convicted of forgery at common law. *Reg. v. Henry Hodgson*, 122

A pawnbroker's duplicate, given in the form prescribed by the statute 39 & 40 Geo. 3, c. 99, is an accountable receipt for goods

within the statute 11 Geo. 4 & 1 Will. 4, c. 66, s. 10.

A. pledged goods with a pawnbroker, and upon redeeming them returned the duplicate. He afterwards discovered that he had not received all the goods which he pledged. He then summoned the pawnbroker before a magistrate; and upon the hearing of the charge, an attorney attended for the pawnbroker, and in his presence handed up to the magistrate a fabricated duplicate as being the genuine duplicate which A. had received on pledging the goods:

Held, that he was properly convicted of uttering a receipt. *Reg. v. Fitchie*, 257

The dividend warrants of a railway company, signed by the secretary and addressed to a banker, required the latter to pay the amount to the shareholder or order, and to charge the same to the company's revenue account. That document required the shareholder's indorsement:

Held, that a clerk of the company who had forged the shareholder's indorsement, was properly convicted of forging a warrant or order for the payment of money. *Reg. v. Autey*, 329

The forgery of an indorsement in this country on a bill drawn abroad on a person in this country, and payable in this country, is an offence within the 30 Geo. 3, c. 63. *Reg. v. Roberts*, 422

The prisoner was indicted for forging at Liverpool a receipt.

Where the prisoner signed a document which entitled him to receive a delivery note, which, in the course of business of the B. Canal Company, would enable him to demand and have the goods described therein delivered to him on payment of the charges for carriage:

Held, to be a forgery of a receipt for goods within the 11 Geo. 4 & 1 Will. 4, c. 66, s. 10. *Reg. v. Richard Meigh*, 401

Forgery at common law must be of some writing or document, and, therefore, the putting the name of a painter upon the copy of one of his pictures, in order that it may be passed off as the original, is not a forgery at common law. But such passing off of the copy of the picture as the original, is a cheat at common law. *Reg. v. Cross*, 594

B. was employed to collect and deliver parcels by a railway company, and was paid a sum for collecting, and also a sum for delivering. The station-master, whose duty it was to pay B., falsely told B. that the company had determined to discontinue paying for the delivery, and to pay only for collecting. The station-master, in his accounts with the company, continued to charge them with pay-

ments to B. for delivery, and as vouchers for such payments wrote on the side appropriated to the collection of parcels, in the printed forms for the accounts "Received for B.," which a servant of B.'s, to whom he paid the moneys, signed. Afterwards the station-master secretly put a receipt stamp under the signature, and wrote across it the aggregate amount both for collecting and delivering the parcels :

Held to be a forgery. *Reg. v. Griffith*, 501
The forgery of a letter of recommendation of character, with intent fraudulently to obtain a situation as a police-constable, is an offence at common law. *Reg. v. Moah*, 503.

HIGHWAY.

Where a turnpike road is out of repair, the justices have no jurisdiction to summon the highway surveyor under 5 & 6 Will. 4, c. 50, s. 94, in the first instance, but the turnpike surveyor should be summoned under proviso in s. 94, and then if he makes it appear that the turnpike trustees have not requisite funds, the highway surveyor may be proceeded against. *Reg. v. Justices of Lancashire*, 76

Where, upon an indictment against the township of G. F. for non-repair of a public road, in the township of W. F., alleging a liability under an award of Inclosure Commissioners, it was contended that the Inclosure Act only gave authority to the commissioners to set out roads in the township of G. F.; but evidence was given for the Crown that the township of G. F. had, on several occasions, repaired the road, as well as others in the township which were not public roads. The jury having found a verdict for the Crown :

Held, that there was evidence from which the jury might infer that at the time when the award was made the road lay entirely in G. F.

The road in question was described in the award as "a carriage road;" it branched out of a public highway, and led to a landing-place on the river Ouse, with a road branching from it to W. F. The landing-place was used by the inhabitants of G. F. and W. F., without paying toll, and by all other persons on payment of a toll to the lord of the manor. In the award some roads were described as public highways and roads, some as public carriage roads, and some as private carriage roads; and one private road was described as a carriage road simply. The Inclosure Act provided that the public roads set out by the commissioners should be repaired by the township of G. F. :

Held, that the road indicted sufficiently appeared to be a public road set out under the powers of the act, and therefore repairable

by the township of G. F. *Reg. v. Inhabitants of the Township of Gate Fulford*, 230

HOUSEBREAKING.

An indictment charged the breaking and entering of the prosecutor's house, and stealing therein certain goods. The evidence was that all those goods had been stolen by other persons before the prisoner entered the house; and the jury found that he was not guilty of the felony charged, but that he was guilty of breaking and entering the house, and attempting to steal therein the goods of the prosecutor. There were goods left in the house which he might have stolen, if he had not been interrupted :

Held, that the conviction was wrong. *Reg. v. M'Pherson*, 281

HUSBAND AND WIFE.

Evidence of husband against a person jointly indicted with his wife, 1

Joint indictment against, for receiving, 382

INCLOSURE.

Indictment for non-repair of a road, 230

INDICTMENT.

The word "parcel" is not a sufficient description of the property alleged in an indictment to have been stolen, and the court will quash a conviction upon such an indictment.

The prisoner was indicted for stealing "one parcel of the value of one shilling, of the goods," &c. The parcel in question was taken from the hold of a vessel, out of a box broken open by the prisoner :

Held, an insufficient description. *Reg. v. Marcus Bonner*, 13

Description of country bank notes, 183

For cheating at cards, 200

Attempt to steal other goods than those charged, 281

Averment in, for false pretences, 392

Larceny by bailee, under 20 & 21 Vict. c. 54, s. 4, 403

For larceny, 421

For rescue, 428

INDICTMENT (FORMS OF).

For rights of highway, 231

False pretences, 304, 369

INSANITY.

A prisoner committed for trial upon a charge of murder having become insane, was removed to a lunatic asylum by virtue of a warrant under the hand of a principal Secretary of State. The grand jury, at the assizes at which he would in due course have been tried, found a true bill against him :

Held, that the proper course was to respite the recognizances *sine die*. *Reg. v. Blackwell*, 351

JURISDICTION.

A., a foreigner, died at L., in England, of injuries inflicted by B., also a foreigner, on board a foreign ship whilst at sea :

Held, that neither section 8 of 9 Geo. 4, c. 31, nor section 1 of 2 Geo. 2, c. 21, was applicable to the case; and that the English court at L. had no jurisdiction to try B. for the offence. *Reg. v. Lewis*, 277

A foreigner on board a British ship on the high seas owes allegiance to the law of England, and if he commits an offence against that law, he is triable under the stat. 18 & 19 Vict. c. 91, s. 21, by any court of justice in Her Majesty's dominions, within the jurisdiction of which he may, at the time of the indictment, happen to be, provided that such court would have had cognizance of the crime if committed within the limits of its ordinary jurisdiction.

And it makes no difference in this respect whether the offender comes voluntarily on board the British ship or is brought and detained there against his will; nor whether he comes voluntarily within the jurisdiction of the particular court by which he is tried, or is brought within that jurisdiction against his will.

And where a foreigner, having committed larceny in England, was followed to Ham-
burgh by an English police-officer, who arrested him without a warrant, and brought him against his will on board an English steamer trading between Ham-
burgh and London, and there kept him in custody in order that he might be tried for the larceny in England: the foreigner having shot the officer during the voyage, and whilst the steamer was on the high seas, under such circumstances that if the killing had been by an Englishman in an English county, the offence would have been murder :

Held, that the Central Criminal Court had jurisdiction under 18 & 19 Vict. c. 91, s. 21, to try the foreigner for the murder of the police-officer. *Reg. v. Benito Lopez*; *Reg. v. Christian Sattler*, 431

The stat. 9 Geo. 4, c. 74, s. 56 (applying to India the English stat. 9 Geo. 4, c. 31, s. 8, as to persons dying within the jurisdiction of felonious wounds given without the jurisdiction, and *vice versa*) does not extend to persons who were not otherwise amenable to the criminal jurisdiction of the court. And the expression "within the limits of the charter of the said united company" means within the "limits of the trading charter." *Nga Hoong v. The Queen*, 489

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LARCENY.

In order to convict the finder of a lost chattel of larceny, it must be proved that at the time of the finding there was either the owner's name upon it, or that something occurred which would give the prisoner at the moment the means of knowing who the owner was.

Upon an indictment for stealing a note it was found by the jury that the note was lost by the prosecutor and found by the prisoner. There was no evidence that the note had any name or other mark upon it indicating to whom it belonged; nor was there evidence of any other circumstances which would disclose to the prisoner at the time when he found it the means of discovering the owner :

Held, that he could not be convicted of larceny, although the jury, being asked whether at or after the time of the finding he believed that there was not a reasonable probability that the owner could be found, had answered that he did believe that the owner could be traced. *Reg. v. Dixon and Another*, 35

Certificates of shares in a foreign railway company are the subject of larceny within the 7 & 8 Geo. 4, c. 29, s. 5. *Reg. v. Smith*, 93

A letter containing a post-office order was delivered by mistake to A., who, after ascertaining that it was not intended for him, appropriated the contents to his own use :

Held, not guilty of larceny. *Reg. v. Davis, alias Rush, and Davies*, 104

In order to make the detention of lost notes by a finder larceny, it is necessary that at the time at which he first took the notes he should have the intention of appropriating, knowing, or having reason to know, who was the owner.

Where, from the manner in which the question has been left to the jury, it is possible that they may have convicted the prisoner, believing that an after-knowledge of the ownership of the notes, and a subsequent detention and appropriation, would justify them in finding the prisoner guilty of larceny, a conviction will be quashed.

Upon the trial of the prisoner for larceny of bank notes, it appeared that the prosecutor had dropped the notes on a public road, and did not miss them for some time. There were no marks which would give a clue to the ownership. Some time after the prosecutor went to the prisoner's house,

stating that he had lost notes on the road in question, and calling upon her to give them up, which she refused, saying she knew nothing of them. On a subsequent occasion, and after an interval of about twelve months, a search was made, and several of the notes were found with the prisoner. The judge in charging told the jury that, if she took the notes and kept them, knowing who was the owner, with the intention of appropriating, they should convict her :

Held, wrong in not confining the attention of the jury to the precise time at which the notes were first taken up. *Per Lefroy, C. J. Reg. v. Mary Shea, 147*

A. was indicted for stealing 95*l.* in money. The evidence was, that he stole certain notes of a country bank which were not then in circulation, for value, but which had been paid in at one branch of the same bank, and were in course of transmission to another branch, where they had been originally issued, in order that they might be there re-issued or otherwise disposed of :

Held, that A. was guilty of larceny ; and that, since the 14 & 15 Vict. c. 100, s. 18, the offence was correctly described in the indictment. *Reg. v. West, 183*

An adulterer who takes possession of none of the husband's property except the wearing apparel of the wife cannot be convicted of larceny.

Upon an indictment for larceny of a bonnet and other articles of female apparel, it was proved that the prisoner, who was a lodger in prosecutor's house, agreed with his wife that they should go away and live together in adultery. He went away leaving the husband and wife together ; she followed, and shortly afterwards the prisoner and wife were found together, the prisoner at that time carrying a box which contained her wearing apparel :

Held, that he could not be convicted of stealing those articles. *Reg. v. Fitch, 269*

As a matter of law it is not incumbent upon the prosecution, on a trial for larceny, to call as witnesses the persons whom the prisoner has named as able to account for his possession of the stolen property, though the persons so named are known and might be called. *Reg. v. Joseph Wilson, 310*

Where a witness has been rightly, by direction of the court, acquitted, he may be examined for the prosecution.

If property be taken with the intention of holding it until the rightful owner should pay a certain sum, and compelling such payment, this is sufficient to complete the offence of larceny.

It is not necessary in order to bring a case

within the above acts, that the money paid for the purpose of procuring the return of stolen property should be paid before the property was actually restored, provided it was paid in pursuance of a previous agreement on the subject. *Reg. v. O'Donnell, 337*

The prisoner went into the shop of the prosecutor and purchased some tobacco, at three-halfpence, and tendered a half-crown in payment. The prosecutor's shopman put down two shillings upon the counter, while he was counting out the rest of the change ; the prisoner took up the two shillings, and pretending to throw them into the till, though in reality he only threw back one, asked for four sixpences instead of them ; he received one shilling and two sixpences :

Held, that he could not be convicted of larceny. *Reg. v. Williams, 355*

In order to constitute larceny, the taking must be with intention to vest the property in the thief ; and therefore, where servants employed by a glovemaking in finishing gloves, removed a quantity of finished gloves from one part of the master's premises to another, with intent fraudulently to obtain payment as for so many gloves finished by them :

Held, that they were not guilty of larceny. *Reg. v. Poole and Another, 373*

Upon an indictment for stealing numerous articles laid as the property of the ordinary, the evidence was, that the articles belonged to a deceased person, that a search had been made for a will, but none found ; that some small portion of the articles had been seen in the house of deceased after her death, and before her funeral ; and that on the day of the funeral the prisoner took the bulk of them to the house of a witness :

Held, that there was abundant evidence that some of the articles had been stolen after the death, and that, consequently, the property was rightly laid in the ordinary ; and that the Court of Quarter Sessions had done quite right in refusing to the prosecution an election to proceed in respect of the taking of any particular articles, as there was some evidence that all were taken after the death. *Reg. v. Johnson, 379*

A copper sundial fixed on the top of a wooden post standing in a churchyard, is metal fixed in land in a place dedicated to public use, and the subject of larceny, within the 7 & 8 Geo. 4, c. 29, s. 44. *Reg. v. Jones, 498.*

Upon an indictment charging that the prisoner whilst servant to A. stole the money of A., the proof was that he was servant to

B., and that the money which he stole was the money of B., but in the possession of A. as the agent of B.:

Held, properly convicted of simple larceny.

Reg. v. Jennings, 397

A bailee charged with fraudulently converting bailed property under the 20 & 21 Vict. c. 54, s. 4, was indicted in the ordinary form as for larceny, with a conclusion *contra formam*:

Held, good. *Reg. v. John Haigh*, 403

Upon an indictment for larceny, with a count framed under 20 & 21 Vict. c. 54, s. 4, it was proved that a box of plate having been deposited with the prisoner for safe custody, he broke it open, and took out a part of the plate, which he offered to a pawnbroker as a security for 50*l*. His offer was declined, but he afterwards pledged the whole box of plate with another person as security for 200*l*. When he was called upon to restore the plate to the owner, he had not the means of redeeming it, and was taken into custody.

The jury found the prisoner guilty on both counts, but recommended him to mercy, believing that he intended ultimately to return the property:

Held, that under these circumstances the prisoner was rightly convicted of larceny at common law; because the jury had found a verdict of guilty, which was well warranted by the evidence; and though they had recommended him to mercy on the ground that he intended ultimately to restore the property, that expression was not necessarily inconsistent with the verdict, and ought not to be considered equivalent to a finding, that at the time when he took the plate wrongfully he took it for the purpose of merely making a temporary use of it.

The decision in *Reg. v. Holloway* (3 Cox Crim. Cas. 145) confirmed, that to constitute larceny there must be an intention permanently to deprive the owner of the property.

Semble, that if not a larceny at common law it could not be made such by the 4th section of 20 & 21 Vict. c. 54. *Reg. v. Trebilcock*, 408

A. was employed by a banking company to conduct an office at B., and the whole of the duties there were discharged by him alone. He was paid a salary, for which he was bound to provide a place for carrying on the bank business, and the office so provided was attached to his own house, in which he carried on a separate business. The office was fitted up by the bank, and an iron safe provided, into which it was A.'s duty to put each night the money received during the

day, and which had not been required for the purposes of the bank. One key of his safe was kept by the banking company. He furnished weekly accounts of moneys received and paid by him, showing the balance in his hands, and of what notes, cash, or securities that balance consisted. Audits of his accounts were made occasionally, and his cash in hand examined. On the last of such audits he was found deficient in his cash to the amount of 3,000*l*. and he admitted that he had taken that amount. On the last previous audit, two years before, his cash had been found correct. The learned judge advised the jury to find the prisoner guilty of larceny, if they were satisfied, upon the whole of the facts, that any part of the sum admitted to have been misappropriated had at any time during the two years been taken from money which, having been received from customers, had before such taking been placed in the safe and included in the weekly accounts furnished by the prisoner. The jury found the prisoner guilty of larceny, as a clerk, in having stolen some money received from customers which, before such stealing, had been placed in the safe and made the subject of a weekly account:

Held, that the conviction was right, there being evidence from which the jury might draw the conclusion that some part of the money taken by the prisoner had been previously reduced into the master's possession by being put into the safe, and it not being necessary that they should find any specific amount to have been stolen on any particular day. *Reg. v. Wright*, 413

An indictment for larceny, and receiving goods knowing them to have been stolen, is bad, if it does not state to whom the goods belonged; and the defect cannot be amended, nor is it cured by 14 & 15 Vict. c. 100, s. 8. *Reg. v. Ward*, 421

Evidence of, 1

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LIBEL.

On the trial of an indictment for libel the only evidence of publication was the sending it in a letter addressed to the prosecutor himself, and the receipt of it by him:

Held, that there was sufficient evidence to go to the jury, although the indictment contained no allegation of an intent or a

tendency to provoke a breach of the peace.
Reg. v. Brooke, 251
 Criminal information for, 16

MAGISTRATE.

At the hearing of a summons for an offence under the Fishery Acts, one of the magistrates, Sir H. D. M., was interested in the decision, and sat on the bench. He stated openly in court that he should take no part in the hearing of the case, but made an observation in the course of the case, that he could prove a material fact in controversy. He also remained and was present at the consultation of the magistrates. Sir H. D. M. stated that he took no part in the matter save as above stated, and that he did not vote upon the decision of the case :

Held, that notwithstanding the disclaimer, that he took such a part in the hearing as invalidated the conviction. *Reg. v. O'Grady*, 247

MANSLAUGHTER.

The prisoner had procured certain drugs and given them to his wife, with intent that she should take them in order to procure abortion. She took them in his absence, and died from their effects. On an indictment against him for manslaughter, it was objected that he was only an accessory before the fact, and that in law there cannot be an accessory before the fact to manslaughter:

Held, that he was properly found guilty of manslaughter. *Reg. v. Gaylor*, 253

Upon an indictment for manslaughter, it appeared that the death was occasioned by the falling of a truck full of bricks into the shaft of a mine, when the deceased was at work; and that the truck fell in, in consequence of the prisoner's neglect of duty in omitting to place a stage over the mouth of the shaft. The prisoner having been convicted :

Held, that the conviction was right; as the crime of manslaughter, no less than that of murder, might be committed by acts of omission as well as of commission. *Reg. v. David Hughes*, 301

On the high seas, jurisdiction on, 277
 By rape, 406

MISDEMEANOR.

It is an indictable misdemeanor at common law to remove without lawful authority a corpse from a grave in a burying-ground belonging to a congregation of Protestant

dissenters, although the motive of the person so acting may be pious and laudable :

So held, in a case where a son, from motives of filial affection and religious duty, removed the corpse of his mother from a family grave in a dissenters' burial-ground, for the purpose of its interment together with that of his father, in a consecrated churchyard. *Reg. v. George Brereton Sharpe*, 214

MURDER.

If A. procures poison and administers to B. both intending that B. should take it to procure abortion, and B. afterwards takes it for the purpose of poisoning C. with it in the absence of A. :

Held, that A. may be convicted of causing it to be taken. *Reg. v. Wilson*, 190

To sustain a conviction under 7 Will. 4 & 1 Vict. c. 85, s. 2, for causing a bodily injury dangerous to life, with intent to murder, it is not enough to prove a mere temporary functional derangement, such as congestion of the lungs and heart arising from exposure to cold.

Where therefore a woman left her infant child exposed in an open field on a cold wet day, and it was found there after some hours nearly dead from congestion of the lungs and heart, which would shortly have proved fatal if relief had not been given, but by care it was restored in a few hours, so that no bodily injury remained :

Held, that the mother could not be convicted under the statute of causing bodily injury dangerous to life. *Reg. v. Harriet Gray*, 326

Where two persons charged with murder by the same indictment had made statements implicating one another, and those statements were evidence for the prosecution, the court, upon the application of the counsel appearing for one prisoner, allowed them to have separate trials.

Where two persons go out with the common object of robbing a third person, and one of them, in pursuit of that common object, does an act which causes the death of that third person, under such circumstances as to be murder in him who does the act, it is murder in the other also. *Reg. v. Jackson and Another*, 357

Where the prisoner committed a felony on the person of a child, whereby she died, the jury were directed that they might find a verdict of manslaughter. *Reg. v. Greenwood*, 404

Shooting with intent, mistake as to person shot at, 51

MUTINY ACT.

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NUISANCE.

An indictment stated that the defendants unlawfully, knowingly, and wilfully, did deposit and cause to be deposited in a warehouse belonging to them, and near to divers streets, common highways, and dwelling-houses, divers large and excessive quantities of a certain dangerous ignitable and explosive fluid called wood naphtha, and did unlawfully, knowingly, and wilfully keep in the said warehouse, and near to the said streets, &c., the said fluid in such large, excessive, and dangerous quantities, that the Queen's subjects in passing along the said streets, &c., and the same who were residing near the said warehouse, were in great danger and peril of their lives and properties, and were kept in great alarm, fear, and terror, to their common nuisance:

Held, that the indictment disclosed an indictable offence, although there was no statement of any noxious effluvia arising from the said premises, or of any substantial injury sustained by any one beyond the fear and the danger caused by the substances being so kept.

The evidence in support of the indictment showed that wood naphtha is the product of the distillation of wood, is very inflammable, more so than spirits of wine, and that if inflamed, water, unless applied in enormous quantities, would not put it out, and that, practically, a fire happening could not be quenched. But it was proved also, that it was the practice in the warehouse never to allow any candle, fire, or gas-light to enter therein, and so long as that continued, the storing of the wood naphtha and the spirits would not produce danger:

Held, that it was a question for the jury whether there was any real danger to life and property arising from the way in which the materials were kept, and that danger *ab extra* alone was sufficient to justify them in finding a verdict of guilty.

The evidence of the way in which the business was carried on, was this: the quantities stored were from 4,000 to 5,000 gallons of wood naphtha, and from 40,000 to 45,000 gallons of spirits of wine. The operation of mixing the two together was carried on upon the premises. For this purpose, there were two large vats erected: each of these was capable of holding about 2,000 gallons of the mixture. The vats

were covered over entirely at the top, with the exception of an aperture in the centre of the cover, in which was fixed a hopper with a sliding panel of wood. When it was necessary to mix, the spirits of wine first and the naphtha afterwards were poured through the hopper into the vat below; where, by the chemical action upon each other, they became intermixed, and were drawn off at the bottom by a cock, and carried away for the purposes of commerce.

Held, that this was sufficient evidence to support the charge in the indictment of depositing the article in a warehouse; *dis-sentiente*, Pollock, C. B., who thought the conviction in this particular instance wrong, because the allegation of depositing the article in a warehouse was sought to be supported by evidence of a dangerous use of it by mixing, and he suggested the propriety of another indictment being preferred. *Reg. v. Lister and Biggs*, 342

PERJURY.

On the second trial of an indictment for perjury, fresh witnesses for the defence were called to prove facts confirming the prisoner's alleged false statement. A witness called by the prosecutor to contradict a fact deposed to by them was allowed to prove that on the former trial a particular question was put to him, on his cross-examination by the prisoner's counsel, in order to show that at that time the prisoner's counsel had notice of the testimony now given, but did not venture to call the witnesses. *Reg. v. Coyle*, 74

The duty of the coroner is not confined to ascertaining the cause of death, but he should inquire into all the circumstances attending it; and, therefore, when a witness has untruly answered on a coroner's inquest that he and the deceased, with whom he had been in company, had not been tipping, or in a public-house, on the evening preceding the death, such answer is material to the inquiry, and will, if untrue, support an indictment for perjury.

Semble, the question of materiality is one for the judge and not the jury to decide upon. *Per Monahan, C. J., Richards, B., Jackson, J., and Greene, B. Ball, J., dubitante.*

Perjury assigned, on answers of the prisoner, that he had not tasted any intoxicating drink, or been in a public-house on a particular evening. These answers were given on an inquest held on the body of a

man who had been found dead, but without any marks of violence or anything to cause suspicion of his having died from other than natural causes :

Held, nevertheless, directly material, as the coroner was bound to inquire into all the circumstances attending death.

On the trial the judge had left the question of materiality to the jury, who found the prisoner guilty :

Held, under these circumstances, that, whether materiality be a question for the judge or the jury, the conviction was right.

R. v. Lavey (3 Car. & K. 26) observed on.

Reg. v. James Courtney, 111

The mother of a bastard having been resident with her parents in one petty sessional division, went to lodge at D. in another division for the purpose of affiliating her child, D. being nearer and more convenient for her than the place where the magistrates acting for the other division met. She lodged at D. three weeks before she obtained the summons, having in the interval made one unsuccessful application ; and after obtaining the order, went into service in the division in which her parents resided, but without returning to them ; and she stated that she could not go back to them, as they had nothing for her to do. Whilst at D. she had no other home :

Held, that the jury were warranted in finding that at the time of her application at D. she was residing within that petty sessional division ; that the magistrates had jurisdiction, and a conviction for perjury committed by her on that occasion was right. *Reg. v. Hughes*, 287

PLEADING.

The "parcel" in an indictment, 13

Pleading double, 85

Autrefois acquit, 186

In whom property to be laid, 384

POACHING.

In a case of night-poaching, it is not necessary on the part of the prosecution to call the occupier or the owner of the land to prove that the persons charged were not upon the land by their permission *Reg. v. Wood*, 106

PRACTICE.

When a prisoner, who has pleaded guilty, has been discharged without receiving sentence, on giving an undertaking, and entering into recognizance to appear and abide the judg-

ment of the court upon receiving due notice, afterwards violates his undertaking, the court will proceed to pass sentence upon the prisoner surrendering, after calling upon him to say why judgment should not be awarded.

The finding of a bill against the prisoner for an offence which would be in breach of his undertaking, will be regarded by the court as evidence to inform itself of the prisoner's bad faith. *Reg. v. Ryan*, 139

In a prosecution directed by the Poor Law Board, counsel for the Crown cannot claim the right to reply, where the prisoner calls no witnesses. *Reg. v. Beckwith*, 505

The Attorney-General for the County Palatine, though prosecuting in person, has no right to reply. *Reg. v. Christie*, 506

Under what circumstances bail will be accepted in conspiracy. *Reg. v. Gallagher*, 509.

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PROPERTY.

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PUNISHMENT.

The prisoner, who pleaded guilty to stealing a gold watch from a house at which she was visiting, in an affidavit in mitigation of punishment, stated, that she had no felonious design intaking the watch ; that it was a temporary embarrassment which had induced her to take it to raise money on it, and that she intended releasing and returning it to the owner ; that her family were in a respectable condition of life, and that the disgrace of committing such an offence, and the loss of character, was a most serious punishment. It was considered, however, by the court, that such circumstances constituted an aggravation of the offence, as it

was neither from want or ignorance that the prisoner had committed the crime. *Reg. v. —*, 4

RECEIVING.

A husband and wife being jointly indicted for receiving stolen goods, the jury found both guilty, stating that the female prisoner received them without the control or knowledge of, and apart from, her husband, and that he afterwards adopted her receipt :

Held, that the conviction could not be sustained as against the husband. *Reg. v. Dring and Wife*, 382
Venue and jurisdiction, 335

RESCUE.

A. was indicted for the rescue of a distress from a collector of poor's rate. The name of the defendant did not appear in the rate, and there was no name or description of the parties liable to the payment of the rate in the appropriate column, except the general words, "tenants of common." The transcript of the rate book, to which the collector's warrant was annexed, was similarly defective. It was not disputed that A. was the occupier of the lands, and might have been rated as such :

Held, that under the above warrant the collector had no power to distrain the defendant's goods, and that the indictment could not, therefore, be sustained. *Reg. v. Boyle and Others*, 428

REWARD.

For restoring stolen property, 337

SHOOTING.

If A. intending to murder B. shoots at and wounds C., supposing him to be B., he is guilty of wounding C. with intent to murder him ; for he intends to kill the person at whom he shoots. *Reg. v. Smith*, 51

TRIAL.

Upon a trial for murder, one juryman answered and was sworn and served in the name of another juryman. The prisoner was convicted and sentenced. On the following day

the mistake was discovered ; and a case was reserved for the opinion of this court.

Two questions were raised : first, whether there had been a mistrial ; second, whether this court had jurisdiction to decide that point :

Held, by Lord Campbell, C.J., Cockburn, C.J., Coleridge and Wightman, JJ., and Martin and Watson, BB., there had been a mistrial, and that this court had jurisdiction to order that the prisoner should be tried again :

By Erle, Crompton, Crowder, Willes, and Byles, JJ., and Channel, B., that there had been no mistrial ; and by Pollock, C.B., and Williams, J., that if there had been a mistrial, this court had no jurisdiction to set aside the verdict and order a second trial :

Held, also, by Erle and Crompton, JJ., and Channel, B., that this court had no jurisdiction ; and Crowder, Willes and Ryles, JJ., were also inclined to the same opinion. *Reg. v. Aaron Mellor*, 454

TURNPIKE.

A horse and cart employed by a dust-contractor in conveying street sweepings (found in the case to be manure) from the city to a place of deposit, partly for the contractor's own use as manure, but principally for the purpose of sale as manure, was held to be within the following exemptions from toll in a turnpike act : "for any horse or other cattle or carriage employed in carrying or conveying (among other things) manure employed in husbandry for manuring or improving the land." *Reg. on the Prosecution of Sinnott v. Freke*, 32

VENUE.

The half of a country bank-note having been stolen at some period during its transit from S. in Wilts, to Bristol, was afterwards enclosed by the prisoner in a letter addressed to the bankers at S. demanding payment, which letter was posted at Bath. There was no other evidence of any receipt or possession by the prisoner in Wilts :

Held, that the prisoner was rightly tried in Wilts, as the possession either of the post-office servants or the bankers was his possession ; and the case was therefore brought within stat. 7 & 8 Geo. 4, c. 29, s. 56. *Reg. v. George Cryer*, 335
In false pretence by letter, 100
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VERDICT.

Where a verdict is inconsistent, the court will award a *venire de novo*.

The prisoner was indicted for stealing three sheep, the property of E. J. There was a count charging him with receiving the same goods on the same day. The finding of the jury as entered on the record was, that the prisoner was "guilty of the premises on the said indictment above specified."

Held, that although such finding amounted to a finding of guilty on each count, yet as it was impossible that the prisoner could

have been guilty of both offences, under the circumstances the Crown should not be at liberty to enter a *nolle prosequi* on one count, and move for sentence on the other, but that a *venire de novo* should be awarded. *The Queen in error v. Evans*, 151

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FALSE PRETENCES.

In answer to questions contained in the form of attestations for militia volunteers issued by the War Office, a recruit answered that he did not belong to nor had been enrolled in any other corps of militia, and that he did not belong to nor had served in Her Majesty's army; whereas, in truth, he had previously been enrolled in another corps of militia:

Held, that he could not be convicted upon an indictment framed under sect. 57 of the Mutiny Act (18 & 19 Vict. c. 11), as the forms in the schedule to that act contained no such question as had been put to the prisoner respecting his previous enrolment in the militia; and as his negative answer to the question whether he had served in the army, could not be considered wilfully false. *Reg. v. James Jessup*, 70

A letter containing a false pretence was received by the prosecutor through the post in the borough of C.; but it was written and posted out of the borough. In consequence of that letter he transmitted through the post to the writer of the first a post-office order for 20*l.*, which was received out of the borough:

Held, that in an indictment against the writer of the first letter for false pretences, the venue was well laid in the borough of C. *Reg. v. Leech*, 100

A false and fraudulent statement to a pawn-

broker, that a chain offered as a pledge is silver, is indictable as a false pretence under the statute of 7 & 8 Geo. 4, c. 29, if money be thereby obtained; and upon the trial of such an indictment evidence is admissible of misrepresentations made by the prisoner to others about the same time, and of the possession by him of a considerable number of chains of the same kind.

If the false statement be made with intent to obtain money, but the prosecutor relies entirely upon his own examination of the chattel, and not at all upon the prisoner's statement, the latter cannot be convicted of the complete offence, but is guilty of an attempt to commit it. *Reg. v. Roebuck*, 126

A. applied to B. for a loan upon the security of a piece of land, and falsely and fraudulently represented that a house was built upon it. B. advanced the money upon A. signing an agreement for a mortgage, depositing his lease, and executing a bond as collateral security:

Held, that A. was properly convicted of obtaining money by false pretences. *Reg. v. Burgon*, 131

A person, who by falsely representing himself to fill a particular character, induces another to enter into a contract with him for board and lodging, and is supplied accordingly with various articles of food, cannot be convicted of obtaining goods by false pretences, the obtaining of the goods being too remotely connected with the false representation. *Reg. v. Gardner*, 136

An indictment charged that the defendant knowingly falsely pretended that a horse was sound, and that he himself was a farmer at O., negating both pretences in the usual way. The defendant was convicted, but a case was reserved in which, after stating that the false representations were made, and the money obtained as alleged, and that the defence was, that this was a case of giving a false warranty, and therefore not indictable, the question was put whether the conviction could be sustained. The court having directed an amendment of the case, the facts proved at the trial were set out more specifically; but it was not stated as a fact that the defendant knew the horse to be unsound, though evidence was stated from which that inference might be drawn; nor was it stated what direction the chairman had given to the jury:

Held, that as the case was framed, the conviction must be quashed; as the court, not knowing what direction had been given to the jury, could not answer the question put to it in the affirmative; and as it was consistent with the case that the jury might

- have been told that even if the defendant did not know that the horse was unsound, he might be convicted upon the other false statement alone. *Reg. v. Keighley*, 217
- An indictment for obtaining money by false pretences cannot be sustained, if the prosecutor when he parted with his money knew the representation to be false. *Reg. v. Mills*, 263
- On an indictment for false pretences, it was proved that prisoner, after having agreed with prosecutor to sell and deliver a load of coals at a certain price per cwt., falsely and fraudulently pretended that the quantity which he had delivered was 18 cwt., and that it had been weighed at the colliery, and the weight put down by himself on a ticket, which he produced, he knowing it to be 14 cwt. only, and thereby obtained an additional sum of money:
- Held, to have been properly convicted. *Reg. v. Sherwood*, 270
- A. falsely represented to B. that a third person was baling up for him a quantity of leather which was to come into his warehouse that afternoon, and requested B. to purchase it at a price which he named. B. agreed to become a purchaser at that price, and thereupon A. asked B. to accept a bill for the amount of the purchase money. B. consented; and A. shortly afterwards produced a bill of exchange duly stamped, signed by himself as drawer, payable to his own order, and addressed to B. This bill A. handed to B. who accepted it and returned it to A., by whom it was indorsed and discounted:
- Held, that A. could not be convicted of obtaining from B. a valuable security by false pretences, as the instrument whilst in B.'s hands was of no value to him or to any one else, unless to the prisoner; and as B. had no property either in the instrument or the paper on which it was written. *Reg. v. Danger*, 303
- A simple misrepresentation of the quality of goods is not a false pretence within the statute 7 & 8 Geo. 4, c. 29, s. 53, provided the goods are in specie that which they are represented to be.
- In order to obtain an advance of money on a large quantity of plated spoons, the defendant represented to a pawnbroker that they were of the best quality, that they were equal to Elkington's A. (meaning spoons and forks made by Elkington, and stamped by him with the letter A), that the foundation was of the best material, and that they had as much silver upon them as Elkington's A. The jury found that these representations were wilfully false, and that by means of them an advance of money was made:
- Held (*dissentientibus* Willes and Bramwell), that the conviction was wrong, and that the representation being a mere exaggeration or puffing of the quality of the goods in the course of a bargain, it was not a false pretence within the statute. *Reg. v. Bryan*, 312
- Where the prisoner, in July, 1857, gave in exchange for the sum of 5*l.* a promissory note for the payment of 5*l.* of the Old Bank, Newport, Monmouthshire, and stated that the note was a good one, though in reality the Old Bank had stopped payment in the year 1851, as the prisoner well knew, it was held that he could not be convicted of obtaining the 5*l.* by false pretences. *Reg. v. Williams*, 351
- Upon the trial of an indictment for obtaining money by false pretences, it was proved that the prosecutor, upon the faith of certain representations made to him by the prisoner, entered into a partnership with him, and advanced money as part of the capital of the firm:
- Held, that under these circumstances, a conviction could not be sustained. *Reg. v. Watson*, 364
- An indictment for false pretences charged that the prisoner did "unlawfully obtain from A. B. a cheque for the sum of 8*l.* 14*s.* 6*d.* of the moneys of C. D.:"
- Held, that this averment sufficiently described the cheque to be the property of C. D. *Reg. v. Godfrey*, 392
- Upon an indictment for obtaining money by false pretences, it appeared that the prisoner had told the prosecutrix that she kept a shop at a particular place, and that she might go home with her until she got a situation. She then borrowed 10*s.* of her, and promised to repay it when they got home; but having got the money she left the prosecutrix altogether. It was untrue that she kept a shop at the place named; and the prosecutrix stated that it was on the faith of that representation that she parted with the money. The jury found the prisoner guilty of fraudulently obtaining the half-sovereign, the prosecutrix parting with it under the belief that the prisoner kept a shop at the place mentioned, and that she should have the money when she went home with the prisoner:
- Held, that the conviction was right. *Reg. v. Fry*, 395
- A person who fraudulently offers a 1*l.* bank-note as a note for 5*l.* and gets it changed upon that representation, may be convicted under the statute for obtaining money by false pretences, although the party to whom it



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